No. 04-905

Title:	Volvo Trucks North America, Inc., Petitioner v. Reeder-Simco GMC, Inc.
Docketed:	January 5, 2005
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(02-2462)
Decision Date:	July 12, 2004
Rehearing Denied:	October 6, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 4 2005	Petition for a writ of certiorari filed. (Response due February 4, 2005)
Feb 2 2005	Brief of respondent Reeder-Simco GMC, Inc. in opposition filed.
Feb 2 2005	Motion for leave to file amici brief filed by Truck Manufacturers Association, et al.
Feb 3 2005	Motion for leave to file amicus brief filed by National Association of State Directors of Pupil Transportation.
Feb 4 2005	Motion for leave to file amicus brief filed by Washington Legal Foundation.
Feb 16 2005	DISTRIBUTED for Conference of March 4, 2005.
Feb 16 2005	Reply of petitioner Volvo Trucks North America, Inc. filed. (Distributed)
Mar 7 2005	Motion for leave to file amici brief filed by Truck Manufacturers Association, et al. GRANTED.
Mar 7 2005	Motion for leave to file amicus brief filed by National Association of State Directors of Pupil Transportation GRANTED.
Mar 7 2005	Motion for leave to file amicus brief filed by Washington Legal Foundation GRANTED.
Mar 7 2005	Petition GRANTED.
Mar 25 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 20, 2005.
May 20 2005	Joint appendix filed. (Jt. appendix in two volumes
May 20 2005	Brief of petitioner Volvo Trucks North America, Inc. filed.
May 20 2005	Brief amicus curiae of United States filed.
May 20 2005	Brief amicus curiae of National Electrical Manufacturers Association filed.
May 20 2005	Brief amicus curiae of Washington Legal Foundation filed.
May 20 2005	Brief amici curiae of Truck Manufacturers Association, et al. filed.
May 20 2005	Brief amicus curiae of American Petroleum Institute filed.
Jun 3 2005	Extension of time within which to file respondent's brief on the merits to

	and including July 25, 2005.
Jun 9 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 20 2005	SET FOR ARGUMENT on October 31, 2005.
Jul 21 2005	Brief amicus curiae of National Automobile Dealers Association filed.
Jul 25 2005	Brief amici curiae of North American Equipment Dealers Association, et al. filed.
Jul 25 2005	Brief of respondent Reeder-Simco GMC, Inc. filed.
Aug 29 2005	Reply of petitioner Volvo Trucks North America, Inc. filed. (Distributed)
Sep 2 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 4 2005	Record received from U.S.C.A. for 8th Circuit. (1 envelope)
Oct 6 2005	Record received from U.S.D.C. - Western Dist. of Arkansas. (1 box).
Oct 12 2005	Supplemental brief of petitioner Volvo Trucks North America, Inc. filed. (Distributed)
Oct 18 2005	Supplemental brief of respondent Reeder-Simco GMC, Inc. filed. (Distributed)
Oct 31 2005	Argued. For petitioner: Roy T. Englert, Jr., Washington, D.C.; and Thomas G. Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae). For respondent: Carter G. Phillips, Washington, D.C.

Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Robinson-Patman Act prohibits specified forms of price discrimination "between different purchasers" where the effect of "such discrimination" may be harm to competition "with any person who * * * knowingly receives the benefit of such discrimination." The questions presented are:

1. Whether an unaccepted offer that does not lead to a purchase – so that there is not "discriminat[ion] * * * between different purchasers" as the statutory language contemplates – may be the basis for liability under the Act.

2. Whether the Act permits recovery of damages by a disfavored purchaser that does lose sales or profits to a competitor that does *not* purchase from the defendant, but does not lose sales or profits to any purchaser that "receives the benefit of" the defendant's price discrimination.

PARTIES TO THE PROCEEDING

The petitioner is Volvo Trucks North America, Inc., defendant-appellant in the courts below. The respondent, plaintiff-appellee in the courts below, is Reeder-Simco GMC, Inc.

RULE 29.6 STATEMENT

Volvo Trucks North America, Inc., is a wholly owned subsidiary of VNA Holdings, Inc., which is a wholly owned subsidiary of AB Volvo, a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the Eighth Circuit (App., *infra*, 1a-32a) are reported at 374 F.3d 701. The district court's judgment (App., *infra*, 33a-34a) and order denying judgment as a matter of law (App., *infra*, 35a) are unreported. The district court's order on the jury verdict (App., *infra*, 36a-39a) and order granting summary judgment in part (App., *infra*, 40a-42a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2004. The order of the court of appeals denying rehearing (App., *infra*, 43a-44a) was entered on October 6, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it unlawful

> to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or * * * to injure, destroy, or prevent competition with any person who * * * knowingly receives the benefit of such discrimination.

STATEMENT

A divided panel of the Eighth Circuit has dramatically extended the reach of the Robinson-Patman Act (RPA), which prohibits certain forms of price discrimination. The RPA makes it unlawful, in defined circumstances, for a seller "to discriminate in price between different purchasers * * * where the effect of such discrimination may be * * * to injure, destroy, or prevent competition with any person who * * * knowingly receives the benefit of such discrimination." 15 U.S.C. § 13(a).

Before the Eighth Circuit's decision, courts consistently held that the RPA means what it says when it forbids discrimination between "purchasers" – liability cannot arise from a discriminatory *offer* to sell that does not result in a purchase. Moreover, discrimination between purchasers is not *per se* illegal. Even the most expansive interpretations of the RPA (before the Eighth Circuit's decision here) have construed the statute to protect only competition between favored and disfavored purchasers – not to protect disfavored purchasers from disadvantage when they are competing against other firms that do not purchase the defendant's products. The Eighth Circuit has extended the statutory prohibition beyond its settled meaning by ignoring both of those principles. *Every* incident of alleged discrimination in this case involved either a mere offer to sell (rather than a purchase) or a contention that the plaintiff lost sales or profits to a competitor that did not buy the defendant's products (rather than to a favored purchaser).

The court's errors expand the coverage of the RPA to encompass common and procompetitive pricing practices that previously had been regarded as categorically permissible under the RPA. The decision below comes dangerously close to stating a blanket condemnation of all price differences in the sale of products and conflicts with the plain language of the statute, the decisions of other courts of appeals, and the fundamental policies that underlie the antitrust laws.

The consequences of these errors extend far beyond this case and beyond the boundaries of the Eighth Circuit. The Chair of the Section of Antitrust Law of the American Bar Association observed in 2003 that "[a]rguably[] more business decisions are affected by the Robinson-Patman Act than by any other antitrust law because so many interstate sales and dealer-oriented promotions of commodities are subject to its terms." Robert T. Joseph, *From the Section Chair*, ANTITRUST, Summer 2003, at 3. Because any business that distributes its products

nationally may be sued for treble damages under the RPA in the Eighth Circuit, the decision may deter procompetitive discounting in a large portion of the economy.

A. Volvo's Product Distribution Practices

Petitioner Volvo Trucks North America, Inc. (Volvo) manufactures a broad line of heavy trucks for both highway and vocational (*e.g.*, dump trucks and mixer trucks) use, in competition with other manufacturers such as Freightliner, International, Peterbilt, and Kenworth. Volvo, like other heavy truck manufacturers, offers several different base models of trucks, each of which can be built to a user's precise specifications, using a variety of different engines, transmissions, brakes, axles, suspensions, and other components.

Volvo distributes its trucks throughout the United States through a network of independent dealers, who sell to retail customers such as trucking companies. These retail customers typically solicit competitive bids from several dealers representing different manufacturers, and then purchase from the dealer offering the most attractive bid. Most trucks are built to order after the retail customer has contracted to buy from a dealer. App., *infra*, 2a. It would be prohibitively expensive for a dealer to maintain an inventory of trucks sufficient to meet the widely diverse needs of its potential retail customers. Therefore, during the competitive bidding process Volvo *offers* to sell trucks to its dealers that will meet the retail customer's specifications, and its dealers offer to sell those trucks to the retail customer. A dealer *purchases* the trucks from Volvo only if the retail customer accepts the dealer's bid.

Volvo offers a base wholesale price to its dealers that is 80% of its published retail price. App., *infra*, 2a. During the competitive bidding process, however, dealers often seek an additional discount, or "concession," from the base wholesale price – a discount that permits the dealer, if it independently

decides to do so, to submit a lower bid to the potential retail customer. *Ibid.* Volvo's district sales managers are authorized but not required to offer such discounts up to amounts specified in a matrix that Volvo does not disclose to its dealers or to the public. C.A. ER 1600, 1610-1613. Higher-level personnel from Volvo's headquarters are authorized but not required to offer even larger discounts. See *id.* at 1619. Volvo decides on a case-by-case basis whether to offer a discount and how large such a discount will be, after considering the circumstances of a specific bidding situation. *Id.* at 1622-1623. For example, Volvo may offer a larger discount if its assembly plant is operating well below capacity or if industry-wide demand for trucks is declining. *Id.* at 1606, 1609. It may offer a larger discount for a retail customer that has historically purchased a different brand of truck, and may offer an even greater discount if that customer is expected to purchase a large number of trucks in the future. *Id.* at 1608-1609. Because of these and other factors that vary over time and from one retail customer to another, Volvo frequently offers a different discount – and hence a different price – to a dealer in connection with a bid to one retail customer than it offers to that dealer (or to another dealer) in connection with a bid to a different retail customer. *Id.* at 1617-1618; 1622-1623. Other truck manufacturers use similar pricing practices. *Id.* at 1609, 1612.[1]

When two or more Volvo dealers are competing to sell to the same retail customer, Volvo offers the same discount to each. C.A. ER 1620-1621. Head-to-head competition between Volvo dealers for the same customer, however, is the exception rather than the rule. *Ibid.* Most retail customers solicit a bid from only one Volvo dealer.

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[1] Ford's pricing practices, similar in all material respects, were held not to violate the RPA in *Metro Ford Truck Sales, Inc.* v. *Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998), cert. denied, 525 U.S. 1068 (1999).

B. Reeder's Robinson-Patman Act Claims

Respondent Reeder-Simco GMC, Inc. (Reeder) is a truck dealer located in Fort Smith, Arkansas. App., *infra*, 2a. In 1995, Reeder entered into a five-year franchise agreement with Volvo, with provisions for automatic one-year extensions if Reeder met certain sales objectives that were to be unilaterally determined by Volvo. App., *infra*, 2a. Volvo placed Reeder on "probationary" status when it failed to meet those objectives in 1995 and 1996. C.A. ER 1109; 1138-1139; see *id.* at 1651. After Reeder failed to meet the objectives in 1997 and 1998, Volvo notified Reeder that, if it did not meet the 1999 objectives, its franchise would be terminated effective March 31, 2000. Reeder C.A. Br. 4-5; see also C.A. ER 1651. In February 2000, Reeder sued Volvo, alleging among other things that Volvo had violated the Robinson-Patman Act.[2] App., *infra*, 3a.

At trial, Reeder supported its RPA claim with evidence of selected transactions involving specific retail customers. Reeder produced evidence concerning its sales to four different retail customers and, for each sale, identified a *different* Volvo dealer that sold to a *different* retail customer in an entirely separate transaction. App., *infra*, 4a-6a. Reeder then compared the discount it received from Volvo in connection with its retail sale and the discount Volvo extended to the other Volvo dealer in connection with the other dealer's sale to a *different* retail customer. In each pair of transactions selected by Reeder for these "sales-to-sales" comparisons, Volvo's discount to Reeder was lower than its discount to the other dealer. *Ibid.* Reeder asserted that it would have earned greater profits on each of these sales if Volvo had granted to Reeder the same discount

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[2] Reeder also alleged a violation of the Arkansas Franchise Practices Act, Ark. Code Ann. §§ 4-72-201 to 4-72-209. App., *infra*, 2a. The district court entered a judgment in favor of Reeder on this claim that was affirmed by the court of appeals. That judgment is not challenged in this petition.

that it granted to the other Volvo dealer in connection with the different sale to which it was compared.

Reeder also introduced evidence concerning a large number of unsuccessful bids it submitted to potential retail customers. App., *infra*, 6a. For twelve of these unsuccessful bids, Reeder identified successful bids by other Volvo dealers that resulted in sales to *different* retail customers in unrelated transactions. In each of these "offers-to-sales" comparisons, Reeder was offered a discount (but did not purchase at that discount, because its bid to the customer was unsuccessful) that was less than the discounts at which other dealers purchased from Volvo for resale to *different* retail customers. *Ibid.* Reeder asserted that its bids would have been successful if Volvo had offered it the same discounts that Volvo granted to the other dealers in the separate transactions to which they were compared.

Reeder did not compete against another Volvo dealer in *any* of the bids that were examined in the sales-to-sales or in the offers-to-sales comparisons. In each of the offers-to-sales comparisons, Reeder claimed that it lost a sale *to a non-Volvo dealer* but could have made the sale if Volvo had offered a lower price. App., *infra*, 6a. In each of the sales-to-sales comparisons, Reeder claimed that its profits would have been greater if it could have paid a lower price to Volvo. *Id.* at 4a-6a; see also C.A. ER 149-157. Reeder made no claim that it reduced its price to the retail customer because of competition from another Volvo dealer, because there was no competing bid from another Volvo dealer for any of those sales.

Reeder claimed to have bid to sell more than 5000 trucks (C.A. ER 1159-1161), but it produced evidence of only two instances of claimed discrimination in which Reeder and another Volvo dealer were involved in "head-to-head" competition for the same potential sale. App., *infra*, 12a. In one of these head-to-head comparisons, Reeder competed with Southwest Missouri Truck Center to sell twelve trucks to Hiland Dairy. In

January 1999 Southwest requested and was offered a 7.5% discount; Reeder subsequently requested a 12% discount but was offered only the 7.5% that Volvo had previously offered to Southwest. *Id.* at 4a. Hiland did not make its purchasing decision until August 1999, however and in the intervening period Volvo increased its base wholesale price. Hiland indicated it would purchase from Southwest but demanded the price that had been quoted in January. In response, to compensate for the intervening increase in its base price, Volvo agreed to increase its discount to Southwest to 8.5%. C.A. ER 1627; see also App., *infra*, 4a.

In the only other head-to-head comparison Reeder identified – a bid to sell five trucks to Tommy Davidson (App., *infra*, 12a) – Volvo offered an 18.9% discount to Reeder and to the other Volvo dealer, but Reeder complained that it was offered the 18.9% discount too late, and lost credibility with the customer as a result. C.A. ER 1271-1272. Tommy Davidson chose not to purchase from either Reeder or the other Volvo dealer, but instead bought Freightliner trucks. *Id.* at 1272.

Thus, *all* of the incidents of alleged discrimination had one or both of two characteristics. First, in the sales-to-sales and offers-to-sales comparisons, Reeder did not compete against another Volvo dealer for the sale. For that reason, the alleged discrimination did not cause, and could not have caused, a diversion of sales or profits to a favored purchaser in any of these comparisons. Second, in the head-to-head and offers-to-sales comparisons, Reeder never purchased trucks from Volvo.

Reeder also produced evidence that Volvo adopted a business strategy, the "Volvo Vision," that included plans to reduce the number of Volvo dealers and to increase the average size of the regions that its dealers served. Reeder contended that Volvo limited the discounts it offered to Reeder in order to eliminate Reeder as a dealer. App., *infra*, 3a.

The jury returned a verdict for Reeder on its RPA claim. It found that Reeder suffered actual damages of $1,358,000, and those damages were automatically trebled to $4,074,000. App., *infra*, 33a, 38a. Volvo moved for judgment as a matter of law, which the district court denied. *Id.* at 35a.

C. The Court of Appeals' Decision

A divided panel of the Eighth Circuit affirmed the judgment for Reeder. The majority opinion described the evidence of the offers-to-sales, sales-to-sales, and head-to-head comparisons, as well as the evidence of Volvo's strategy to reduce the number of dealers through which it would sell its trucks, then turned to the requisite elements of secondary-line RPA violations.

The majority indicated that "as a threshold matter Reeder had to show it was a 'purchaser' within the meaning of the RPA." App., *infra*, 8a. The majority also recognized that Reeder was required to show that it competed with favored Volvo dealers, a requirement the majority described as only a showing that "'the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market.'" App., *infra*, 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)). The majority indicated that the RPA required proof of competitive injury, which it described by quoting in part the language of the statute: "The RPA prohibits price discrimination 'where the effect of such discrimination may be substantially to lessen competition * * * or to injure, destroy, or prevent competition.'" App., *infra*, 14a (quoting 15 U.S.C. § 13(a)). The majority's quotation omitted the key phrase that follows the quoted language: "with any person who knowingly grants or receives the benefit of such discrimination." 15 U.S.C. § 13(a).

When it analyzed these essential elements of an RPA claim, however, the majority addressed each in isolation from the

others. It concluded that Reeder was a "purchaser" because, in the four sales-to-sales comparisons, it actually purchased trucks from Volvo. App., *infra*, 10a. In those comparisons, though, there was no competition between Reeder and another Volvo dealer. When the majority considered whether Reeder was in actual competition with favored purchasers, it relied on the two head-to-head comparisons (*id.* at 11a-12a), but in those comparisons it was clear that there was no "purchase" by Reeder. The majority also stated that Reeder competed against favored Volvo dealers on the basis of evidence that Reeder and other dealers competed (or could compete) in the same geographic area (*ibid.*), even though there was no evidence (other than the two head-to-head comparisons that failed to result in Reeder purchases) that Reeder and the other dealers competed *for the same customers* or that there had been *discrimination* by Volvo in connection with any other head-to-head bids.

The majority held that the evidence was sufficient to show competitive injury, which it described as "lost profits and sales to Reeder and other dealers, and that favored competitors received substantial price reductions over a substantial period of time." App., *infra*, 15a. As examples, it pointed to one of the head-to-head comparisons (Reeder's unsuccessful Hiland Dairy bid) and one of the sales-to-sales comparisons. *Id.* at 16a. The majority also relied on the evidence of Volvo's plans to reduce the number of dealers, stating that "the jury properly could infer [that] Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices." *Ibid.*

Judge Hansen dissented, describing the majority's opinion as an "attempt to fit a square peg into a round hole." App., *infra*, 27a. He observed that the market for heavy truck sales

> will never produce the kind of competition the RPA was designed to protect because it will never result in the type of two-purchase transaction that itself creates a market for the goods that are sold. Indeed, where, at the time of the

> end purchase, only one possible seller and one possible buyer exist, competition is totally absent. It is the nature of competitive bidding, not price discrimination, that makes it so.

Id. at 27a-28a. Judge Hansen noted that "'purchaser status' is inextricably intertwined with the existence of actual competition and the potential threat thereto." *Id.* at 28a. In the heavy truck market, "although Reeder and other 'favored' dealers may have competed generally with each other in the larger market for obtaining bids, there is evidence of only two occasions where Reeder competed with a 'favored' Volvo dealer for an actual sale." *Id.* at 29a. The sales-to-sales comparisons were irrelevant "because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." *Ibid.* Judge Hansen also noted that RPA liability properly can be imposed "only where the factors necessary to state an RPA claim all are present in the same relevant transaction. To the extent that the court looks for the existence of one factor in one transaction and the existence of another factor in a second transaction, I conclude that the proof * * * is too tenuous." *Id.* at 30a. The absence of any evidence that sales or profits were diverted from Reeder to favored dealers was also a critical deficiency in Judge Hansen's view. "Although Volvo's conduct may have injured Reeder's ability to compete with non-Volvo dealers, Reeder must look outside the RPA for any relief for this claimed injury. Contrary to the court's assertion, such an injury is not the type of injury to competition that the RPA was intended to prevent." *Id.* at 29a-30a.

Volvo's petition for rehearing *en banc* was denied. Judges Gruender and Hansen dissented. App., *infra*, 43a-44a.

REASONS FOR GRANTING THE PETITION

This is the rare antitrust case that can be resolved simply by following the plain statutory language. In the two head-to-head

comparisons, Volvo did not "discriminate in price between different *purchasers* of commodities" (15 U.S.C. § 13(a) (emphasis added)), because Reeder did not purchase from Volvo in any of those transactions. In the sales-to-sales comparisons, Reeder competed only against dealers that bought trucks from suppliers *other than* Volvo, so there was no harm to "competition with any person who * * * knowingly *receives the benefit of* * * * *discrimination*" by the defendant. *Ibid.* (emphasis added). And, in the offers-to-sales comparisons, Reeder did not purchase from Volvo *or* compete against another Volvo dealer. That should have been the end of this case. Decision after decision from other courts of appeals – and from this Court – has followed the statutory language, and therefore conflicts with the decision below.

As Justice Scalia has observed, "sales of like goods in interstate commerce violate" Section 2(a) "if three conditions are met: (1) the seller discriminates in price between *purchasers*, (2) the effect of such discrimination may be to injure competition *between the victim and beneficiaries of the discrimination* or their customers, and (3) the discrimination is not cost based." *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 577 (1990) (opinion concurring in judgment) (emphasis added). There is simply no doubt here that the two head-to-head comparisons fail the first condition, the sales-to-sales comparisons fail the second, and the offers-to-sales comparisons fail both. The decision below conflicts with the entire relevant body of RPA jurisprudence and erases two bright-line rules on which antitrust lawyers have relied for decades to assure clients that certain forms of competitive discounting are permissible. See, *e.g.*, 3 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW §§ 21.12, 22.12 (1983) (discussing two-purchase and competitive-injury requirements); ABA SECTION OF ANTITRUST LAW, A PRIMER ON THE FEDERAL PRICE DISCRIMINATION LAWS 4, 8 (2000) (same).

I. The Eighth Circuit's Holding That A Discriminatory Offer Can Violate The RPA Is Incorrect And Conflicts With Decisions In Other Circuits That The RPA Prohibits Only Discrimination Between "Purchasers"

The Eighth Circuit's decision is plainly incorrect – and squarely conflicts with decisions in other circuits – to the extent that it rests on alleged discrimination by Volvo in the prices that it *offered* to Reeder in the two head-to-head comparisons and in the offers-to-sales comparisons. The RPA makes it unlawful to discriminate in price "between different *purchasers*." 15 U.S.C. § 13(a) (emphasis added). That language uniformly has been understood to require proof of at least two consummated purchases at different prices. Discriminatory offers do not violate the RPA.

The "two-purchase" rule is such a fundamental aspect of RPA jurisprudence that it is often treated as "jurisdictional." See, *e.g.*, *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604, 615 (4th Cir. 1985). The rule has been applied strictly and literally to preclude RPA liability for discrimination in a wide range of transactions that do not result in two or more "purchases" at different prices. Courts have held, under this rule, that the RPA does not prohibit price discrimination in leases, licenses, product exchange transactions, or consignment arrangements. See, *e.g.*, *Seaboard Supply Co.* v. *Congoleum Corp.*, 770 F.2d 367, 373 (3d Cir. 1985) (consignments); *Export Liquor Sales, Inc.* v. *Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970) (leases), cert. denied, 400 U.S. 1000 (1971); *LaSalle Street Press, Inc.* v. *McCormick & Henderson*, 293 F. Supp. 1004, 1005 (N.D. Ill. 1968) (patent license agreement), aff'd, 445 F.2d 84 (7th Cir. 1971). See also 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2313b, at 20-23 (1999) ("By contrast [to the Sherman Act], the Robinson-Patman Act speaks only of 'purchasers' * * *."). The RPA does not prohibit outright refusals to sell at any price to a prospective

buyer, because a refusal to sell does not lead to a purchase. See *Black Gold, Ltd.* v. *Rockwool Indus., Inc.*, 729 F.2d 676, 682-683 (10th Cir.), cert. denied, 465 U.S. 854 (1984); *Shaw's, Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333-334 (3d Cir. 1939). See also 14 HOVENKAMP, *supra*, ¶ 2312c, at 24. And the Fourth and Fifth Circuits have held that the two-purchase requirement precludes RPA liability in precisely the situation presented in this case: where the defendant allegedly extended discriminatory offers to offerees that were bidding against one another, and where two purchases did not occur because the losing bidder-offeree never completed a purchase.

1. In *Terry's Floor Fashions*, the defendant offered to sell at list price to the plaintiff and at a discount from list price to one of plaintiff's competitors. Both the plaintiff and its competitor submitted bids to a retail customer, but there was only one purchase from the defendant arising from those bids. The Fourth Circuit affirmed the dismissal of the RPA claim because the plaintiff "had not shown, or even alleged, two comparable, completed sales and had therefore not satisfied one of the jurisdictional prerequisites for establishing a violation of Section 2(a) of Robinson-Patman." 763 F.2d at 615.

The Fifth Circuit in *M.C. Manufacturing Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), cert. denied, 424 U.S. 968 (1976), reversed a judgment for the plaintiff where the defendant had offered to sell at different prices to plaintiff and one of its competitors, in connection with their competing bids for a government contract. The plaintiff and the favored offeree "were competitive *bidders* on the * * * contract." *Id.* at 1067 (emphasis in original). Even though their bids were in competition, "[t]hese bids alone cannot form the basis for a Robinson-Patman Act claim since they do not satisfy the two-purchaser requirement." *Id.* at 1067 n.17.

These holdings cannot be distinguished from the decision in this case on the basis of Reeder's "status" as a purchaser.

The plaintiffs in *Terry's Floor Fashions* and in *M.C. Manufacturing Co.* purchased from the defendants in *other transactions*. *Terry's Floor Fashions*, 763 F.2d at 615; *M.C. Mfg. Co.*, 517 F.2d at 1067; see also *Shaw's*, 105 F.2d at 333. Therefore, each of those plaintiffs had the same "status" as a "purchaser" that Reeder had here. The Fourth and Fifth Circuits recognized, though, that the two-purchaser requirement must be satisfied in the specific transaction on which RPA liability is predicated, while the Eighth Circuit ignored that requirement.

2. The two-purchaser rule reflects an important choice Congress made when it drafted the RPA. Congress did not enact an open-ended authorization for courts to protect the business opportunities of prospective buyers. It sought to address a specific set of circumstances: the perceived buying power of chain stores that were emerging to compete against single-store rivals in the 1930s. A prohibition against discrimination between "purchasers" addressed that specific problem (though the interpretation and enforcement of that prohibition also produced widely recognized practical problems and to some degree undermined the basic policies reflected in other provisions of the antitrust laws). Extension of the RPA beyond its express terms, to address forms of price discrimination unlike the paradigmatic practices that led to its enactment, would add to the costs associated with the statute even though Congress has never identified these other forms of price discrimination as a "problem" that needed to be addressed.

The two-purchaser rule therefore serves the important function of restricting the RPA's reach – and limiting the costs associated with its prohibitions – to the specific practices with which Congress was concerned. There is no reason to suppose that Congress intended to prohibit discrimination in the price of services (as opposed to "commodities") or discrimination in the terms of leases, licenses, consignments, and other commercial transactions that do not result in the purchase of a commodity.

Similarly, there is no indication that the statute was meant to address discriminatory refusals to deal or, as in this case, discriminatory offers to sell. Any attempt comprehensively to regulate the myriad forms of commercial "discrimination" would entail enormous complication and cost. Nothing in the RPA suggests that Congress wanted to go down that road.

The requirement of discrimination between "purchasers" can be also be viewed as a congressional decision not to prohibit "attempts." As Professor Hovenkamp explains:

> An unaccepted or uncompleted offer occurs when the seller is willing to quote a price, howbeit a higher price than the seller is charging to other buyers, but the plaintiff fails to purchase the product. Clearly, an unaccepted or uncompleted offer is not a sale; nor is a price quotation that is not followed by a purchase, even if the result of the higher quote is that the plaintiff loses a bid. This is simply another way of saying that there is no "attempt" offense built into the Robinson-Patman Act. If one attempts to violate the statute by offering a prospective purchaser a higher or lower price, but no transaction occurs, the statute simply has not been violated.

14 HOVENKAMP, *supra*, ¶ 2300, at 27 (footnotes omitted). The Eighth Circuit wholly failed to understand this basic principle of RPA law.

II. The Eighth Circuit's Decision Conflicts With Decisions Of Other Circuits That Permit RPA Liability Only If The Discrimination Is Likely To Divert Sales Or Profits From Disfavored Purchasers To Favored Purchasers

As the RPA's words make clear, it protects competition "with any person who * * * knowingly receives the benefit of such discrimination" (15 U.S.C. § 13(a)), *i.e.*, of discrimination

in price "between different purchasers."[3] The Eighth Circuit ignored this limitation by imposing liability for discrimination in transactions in which Reeder did not compete against a favored purchaser, but competed only against non-Volvo dealers.

This radical extension of the RPA – construing the Act to protect disfavored purchasers' ability to compete against *any* firm in the market, not just against the favored purchasers specifically mentioned in the statute – effectively transforms price discrimination into a *per se* violation of the antitrust laws,

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[3] In "secondary-line" cases involving effects on customers of the defendant-seller, courts of appeals have long been divided on whether the RPA requires proof of anticompetitive effects similar to the effects required by other antitrust provisions. The D.C. Circuit, in *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988), emphasized the need to avoid unnecessary inconsistencies between the RPA and other antitrust statutes that are construed to promote "pro-competitive efficiency and maximization of consumer welfare." *Id.* at 1138. Therefore, the D.C. Circuit held that injury to *competition* is required. *Id.* at 1143. The Ninth Circuit has explicitly disagreed with *Boise Cascade*, holding that "the inference of competitive injury that arises from proof of injury to a competitor may not be rebutted by evidence that competition was not adversely affected." *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 653, 655 (9th Cir.), cert. denied, 522 U.S. 943 (1997). The Third Circuit has reached the same conclusion (*J.F. Feeser, Inc.* v. *Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991)), and the Eighth Circuit is aligned with the Third and Ninth Circuits. *Richard Short Oil, Inc.* v. *Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986). In the Eighth Circuit, the requisite effect on "competition" may be established if price discrimination may "substantially lessen the ability of unfavored buyers to continue to compete." *Ibid.*; see also *Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 386 n.3 (8th Cir. 1987) (requisite harm to "competition" is shown if plaintiff and other similarly situated purchasers lost sales or profits because of discrimination). Although the Eighth Circuit's view of what constitutes harm to "competition" under the RPA presents a broad conflict with the D.C. Circuit that is implicated by this case, and could be resolved through a grant of certiorari in this case, the Eighth Circuit's decision is plainly wrong – and in conflict with the decisions of other circuits – under *any* conception of competition, including mere harm to a competitor, because the other statutory requirements are not met.

in contravention of this Court's observation that "the statute as a practical matter could not, and does not, ban all price differences." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993). As the leading treatise explains (14 HOVENKAMP, *supra*, ¶¶ 2333a-2333b, at 88-89):

> The theory of secondary-line Robinson-Patman injury is that the unlawful price discrimination injures the disfavored purchaser[] in its ability to compete with the favored purchaser. * * * [T]he mere payment of a higher price than someone else pays for something is insufficient to support the injury requirement. The disfavored purchaser must be injured in its ability to compete with the favored purchaser. For example, suppose that General Motors sells automobiles to a small dealer in Decatur, Michigan, at a higher price than it does to a large dealer in Atlanta, Georgia. But the two dealers each operate in their own geographic areas and never compete for sales to the same customers. We can certainly say that the Decatur dealer has suffered an injury in the sense that it would be better off if it could purchase cars more cheaply, paying the same price that the Atlanta dealer pays. But this is not the injury that the Robinson-Patman Act contemplates. The injury is not merely in the higher purchase price that would injure any purchaser of an input, but in the loss of ability to compete effectively with the favored purchaser. A plethora of decisions have asserted this basic proposition.

This basic proposition is reflected in two complementary principles of RPA jurisprudence. First, other circuits have held that a disfavored purchaser-plaintiff must prove that it competes against favored purchasers because such competition is an essential predicate for the kind of competitive injury – diversion of sales or profits from disfavored to favored purchasers – that is required for a secondary-line RPA violation. Second, other circuits have held that disfavored purchaser-plaintiffs cannot

recover damages unless they show that the discrimination diverted sales or profits from disfavored to favored purchasers.

1. Decisions in the Second and Fifth Circuits have squarely held that plaintiffs in secondary-line RPA cases must prove that there is competition between favored and disfavored purchasers, such that the discrimination may cause the diversion of sales or profits to favored purchasers. The decision below conflicts with those holdings.[4]

In *Best Brands Beverage*, 842 F.2d 578, the Second Circuit reversed a judgment in favor of a disfavored purchaser. Observing that "price discrimination (or pricing on a non-equal basis) standing alone is not illegal per se," the Second Circuit held that plaintiffs must also prove "the likelihood of competitive injury resulting from the alleged discrimination." *Id.* at 584. This competitive injury is dependent on proof that the disfavored purchaser "was engaged in actual competition with the favored purchaser(s)." This "competitive nexus" is

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[4] This Court's decisions plainly assume – even if they do not hold – that competition that could lead to a diversion of sales or profits from disfavored purchasers to favored purchases is a *sine qua non* of secondary-line RPA liability. For example, *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), held that an inference of competitive injury may be drawn from evidence that producers "sell their goods to some customers substantially cheaper than they sell like goods *to the competitors of these customers*." *Id.* at 50 (emphasis added). *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), observed that actionable RPA injury "is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers." *Id.* at 436. See also *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 570 ("to the extent that" favored purchasers competed against plaintiffs, *Morton Salt* presumption of competitive effect was appropriate); *id.* at 571-572 (evidence of diversion of customers to favored purchaser); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 569-570 (1981) (Powell, J., dissenting) (to recover damages RPA plaintiff must show that unlawful discrimination "allowed a favored competitor to draw sales or profits from him, the unfavored competitor").

required because, "[i]n a secondary-line case, plaintiff must show that the probable effect of the discrimination would be to allow the 'favored competitor to draw sales or profits from him, the unfavored competitor.'" *Id.* at 584-585 (quoting *J. Truett Payne Co.*, 451 U.S. at 569-570 (Powell, J., dissenting in part)).

In *Best Brands Beverage*, the disfavored purchaser and the favored purchaser operated in adjacent geographic areas. The plaintiff produced evidence that transshipping between adjacent areas with different prices was "a pervasive practice," but such evidence was held insufficient to support RPA liability because there was no evidence that transshipping occurred in response to the *specific* price differentials that the plaintiff invoked as a basis of liability, and because the plaintiff did not demonstrate the impact of any transshipping on inter-territory competition. *Id.* at 586. This was a fatal defect, according to the Second Circuit, because competition between "Best [the disfavored purchaser] and Southland [the favored purchaser]" was an "essential element of a price discrimination claim." *Ibid.*

The Fifth Circuit applied the same principle in *M.C. Manufacturing Co.*, 517 F.2d 1059, and in *Infusion Resources, Inc.* v. *Minimed, Inc.*, 351 F.3d 688 (5th Cir. 2003), cert. denied, 124 S. Ct. 2881 (2004). In *M.C. Manufacturing Co.*, the plaintiff contracted to sell a product to the government and paid 32.5 cents per unit to the defendant (a subcontractor) for an input needed to make the product. 517 F.2d at 1062. In connection with a subsequent government procurement, the defendant sold the same product (again as a subcontractor) for 31 cents to a different purchaser. *Ibid.* The Fifth Circuit held that this price difference did not violate the RPA because the lower price could not have diverted sales to the favored purchaser.

> It is the government's unavailability to [plaintiff] as a customer of any of the government's needs under the [second] contract, and its similar unavailability to [the favored purchaser] on the [first contract,] which prevents

> purchases made in performance on one from being in competition with those made under the other. Each contract represented a separate, distinct market open only to a single producer. Once it was awarded the bid * * * [plaintiff's contract] was assured to it to the exclusion of all other suppliers regardless of any discrepancy in prices paid on underlying subcontracts.

Id. at 1067. The plaintiff and the favored purchaser "were not competing for the same consumer dollar" in their activities under the two contracts. *Id.* at 1068.

In *Infusion Resources*, applying the principle that favored and disfavored purchasers must be competing "for the same dollar," the Fifth Circuit rejected an RPA claim because the plaintiff, though it competed with a favored purchaser, did not compete at the time of the price discrimination. 351 F.3d at 692-693.

2. A plaintiff seeking damages for a violation of the RPA must prove "actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.*, 451 U.S. at 562. Plaintiffs must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which made the defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484 (1977) (emphasis in original). The First and Third Circuits have held that, because of this antitrust injury requirement, damages cannot be recovered for a violation of the RPA without proof that the price discrimination harmed the plaintiff's ability to compete *against favored purchasers*. The Eighth Circuit's decision conflicts with those holdings.

In *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981), a directed verdict for the defendant was affirmed, in an opinion by then-Judge Breyer, even though the evidence was assumed to be sufficient to show that the defendant charged higher prices to the plaintiff than to its competitors. Such price differences were not enough to show actual injury caused by the price discrimination, the First Circuit held, because there was no indication that the price differences "could lead *the benefitted competitors* to lower their prices to the point where they could attract significant numbers of Allen Pen's customers or that Allen Pen's overall profitability could be significantly affected." *Id.* at 21 (emphasis added).

In *Stelwagon Manufacturing Co.* v. *Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), cert. denied, 516 U.S. 1172 (1996), the plaintiff proved the existence of substantial differences between the price it paid to the defendant and the price that favored purchasers paid, and also proved that its sales had declined during the period of the discrimination. *Id.* at 1272-1273. The Third Circuit nevertheless reversed a judgment for the plaintiff because there was no proof that the defendant's price discrimination had caused plaintiff to lose sales to favored purchasers. *Id.* at 1276. The district court had denied the defendant's motion for judgment as a matter of law, relying on hearsay testimony that some customers said they could and did buy from a favored purchaser, rather than from the plaintiff, because of its lower prices. *Id.* at 1274. The Third Circuit held that this hearsay testimony was inadmissible to prove the truth of the matter asserted and reversed a judgment for the plaintiff in the absence of any other evidence that the discrimination caused it to lose sales to a favored competitor. *Id.* at 1274-1276.

When a disfavored purchaser loses sales to a competitor that does not buy or sell the defendant's products, rather than to a favored purchaser, the lost sales cannot be said to flow from that which made the defendant's acts unlawful, *i.e.*, the *discrimination* in price. The discrimination could be eliminated by raising prices to the favored purchaser, leaving the unfavored purchaser in exactly the same position *vis-à-vis* the competitor

to which the sale was lost. The absolute level of the price charged to the plaintiff (compared to the price charged by an entirely different seller to the competitor that captured the sale) – *not* the defendant's discrimination – affects the plaintiff's competitive opportunities. As Judge Hansen's dissent explains, "Although it is possible that Reeder lost sales or profits to non-Volvo dealers because it did not receive a sufficiently high concession from Volvo * * *, the *difference* in concessions offered to Reeder and the 'favored' Volvo dealers did not cause the lost sales or profits on those deals." App., *infra*, 31a (emphasis in original). See also *M.C. Mfg. Co.*, 517 F.2d at 1065 (no injury resulting from discriminatory pricing when – even without the complained-of pricing conduct – sale would have been lost to a competitor other than the favored purchaser).

3. In this case, the majority below recognized that Reeder was required to show that it competed against favored Volvo dealers, but failed to comprehend the reason for that requirement: to show that the discrimination could cause the diversion of sales or profits to favored purchasers. The majority concluded that Volvo could be liable for discrimination in the sales-to-sales and offers-to-sales comparisons – where there was no competition between Reeder and other Volvo dealers, and therefore no possibility that sales or profits could be diverted from Reeder to a favored purchaser – because Reeder competed against other Volvo dealers for *other* sales. The court divorced the question whether Reeder competed with favored purchasers from the question whether the discrimination affected that competition, treating the former as a question about Reeder's status, unrelated either to the requisite competitive effect or to the causal link between the discrimination and that effect.

Judge Hansen's dissent recognized this point. "Reeder's attempt to compare a sale that it made to one end user to a sale made by a 'favored' Volvo dealer to another end user with whom Reeder had no relationship simply is not relevant to

proving a violation of the RPA because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." App., *infra*, 29a. Evidence that Reeder and favored dealers "competed generally with each other" is insufficient because "where alleged lost sales or profits were not diverted from Reeder to 'favored' Volvo dealers, but rather to other non-Volvo dealers, it is unclear how any difference in price offered by Volvo to its two dealers could possibly injure actual competition between them." *Ibid.* An RPA violation could be shown only "where the factors necessary to state an RPA claim all are present in the same relevant transaction." *Id.* at 30a; accord *Hasbrouck*, 496 U.S. at 556; *id.* at 577 (Scalia, J., concurring in the judgment).

The conflict between the majority's decision in this case and the decisions in *Best Brands Beverage*, *M.C. Manufacturing Co.*, *Allen Pen*, and *Stelwagon Manufacturing Co.* cannot be reconciled by the observation that Reeder competed to some degree against favored purchasers. There was similar evidence of competition between the plaintiffs and favored purchasers in *Best Brands Beverage*, *M.C. Manufacturing Co.*, *Allen Pen*, and *Stelwagon Manufacturing Co.*, but in those decisions the critical issue was understood correctly to be whether the discrimination could cause diversion of sales or profits from the disfavored to the favored purchaser. That issue cannot be resolved merely by asking whether the plaintiff and favored purchasers compete with one another; courts also must ask whether and how the alleged *discrimination* could *affect* that competition. The other circuits correctly understood that, if the discrimination does not affect the plaintiff's ability to compete against favored purchasers, there can be no violation of the RPA. The Eighth Circuit missed the point.

4. The Eighth Circuit believed that evidence of Volvo's business strategy to reduce the number of Volvo dealers sup-

ported an inference of the requisite competitive injury. That belief is plainly incorrect.

The antitrust laws have long recognized that a manufacturer may limit the number of firms that distribute its products. A manufacturer's outright refusal to deal with a potential distributor is permissible, except in the most extraordinary circumstances. See *Verizon Comm'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004). The RPA prohibits certain forms of price discrimination between different purchasers, but places no restraints on a manufacturer's freedom to choose the number, the identity, the location, or the characteristics of distributors to which it will sell or on a manufacturer's freedom to terminate any distributor at will. The majority based its decision on a belief that "the elimination of some dealers like Reeder * * * is precisely the type of injury the antitrust laws were meant to prevent." App., *infra*, 19a (citing *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)). That belief was clearly wrong. See also, *e.g.*, *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (upholding termination of price-cutting dealer in the absence of an express or implied agreement with another dealer on price).

Nor does Volvo's business strategy shed any light on its motive or intent that supports an inference of competitive injury. As a preliminary matter, there is no reason Volvo would want to divert sales from Reeder to non-Volvo dealers. See Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, in *Symposium: Antitrust at the Millennium*, 68 ANTITRUST L.J. 125, 126 (2000) ("[A] manufacturer cannot profit by weakening its own distribution system or reducing that system's competitiveness.").

More important, as a matter of law, the question whether Volvo discriminated, let alone the question of why it discriminated, has no bearing on the *effect* of the discrimination. Even on the dubious assumption that a desire to eliminate Reeder as

a Volvo dealer provided a motive for discrimination, Reeder was still required to show that the discrimination impaired its ability to compete against a favored purchaser. That essential element of any RPA violation requires proof that the discrimination occurred where there is a competitive relationship between Reeder and the favored dealers. In the absence of any such relationship, Volvo's practices cannot produce the requisite competitive effects, regardless of motive or intent. For that reason, Reeder's sales-to-sales and offers-to-sales comparisons are insufficient, as a matter of law, to support RPA liability.

III. The Eighth Circuit's Decision To Extend The RPA Will Be Harmful To Competition, Even Outside Of The Eighth Circuit

The decision below will be harmful to competition and consumers, and those effects will extend well beyond the boundaries of the Eighth Circuit.

1. Courts have a duty to be faithful to congressional intent when interpreting the RPA and "are not free to consider whether or how the statute should be rewritten." *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 568 n.27. Such restraint is especially important when interpreting the RPA because interpretations that "extend beyond the prohibitions of the Act * * * give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (quoting *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 63 (1953)). Congress drafted the RPA to forbid only certain kinds of price discrimination. "[T]he statute as a practical matter could not, and does not, ban all price differences." *Brooke Group*, 509 U.S. at 220.

2. By extending the RPA to permit recovery for sales lost to any competitor, not just sales lost to a favored purchaser, the decision creates a serious risk of treble-damage liability for any seller that charges different prices to different customers, even

if those differences occur over time and in disparate geographic areas. Under a correct reading of the RPA, manufacturers can adjust their prices to reflect the changes in costs, demand, and competitive conditions, so long as they ensure that those price differences do not tilt the playing field on which their purchasers compete against each other. This is a workable standard because manufacturers have some power to predict whether price differences will lead to a substantial diversion of sales or profits from disfavored to favored dealers. The antitrust laws also permit manufacturers to control the risk of such diversion to a considerable degree, for example, by limiting the geographic areas or the categories of customers that individual dealers will be permitted to serve. The RPA imposes real constraints but does not completely eliminate pricing flexibility.

If RPA liability can arise when sales or profits are diverted to *any* firm that competes against a purchaser, as the Eighth Circuit permits, this flexibility will be greatly reduced. Manufacturers will incur substantial risks of treble-damage liability from *any* price difference. Every distributor of a manufacturer's products will be able to show that it could compete more successfully in the market – that it could sell more units or earn higher profits – if it could pay less when purchasing the products it resells. Whenever a manufacturer charges different prices to different customers, customers who pay the higher price will be able to show this phantom RPA injury.

That risk can arise under the Eighth Circuit's decision even if a manufacturer takes care – as Volvo does – to charge uniform prices to all distributors *within* a market, if the manufacturer nonetheless charges different prices in one market than in another. That is because a distributor operating in both markets will be able to demonstrate its "status" as a competitor to other purchasers in the lower-price market, and demonstrate lost sales or profits to other competitors (who do not purchase from the discriminating manufacturer) in the high-price market.

Perversely, the risk that a manufacturer will incur this newly created liability is greatest in precisely those markets where there is little, if any, risk of a true RPA injury, *i.e.*, in markets where inter-brand competition is intense and intra-brand competition has little competitive significance. In such markets, inter-brand competition drives prices towards costs, and price differences are likely to be based on differences in costs. When facing intense inter-brand competition, an individual manufacturer has no market power, and any attempt to charge an unreasonably high price to a distributor would be contrary to the manufacturer's own interests.[5] See Hovenkamp, *The Robinson-Patman Act*, *supra*, 68 ANTITRUST L.J. at 127 ("[T]he manufacturer cannot profit by making its distribution system more costly, by restricting the volume of product it is capable of handling, or by reducing its competitiveness against the products of other manufacturers."). It is in such markets, more than any others, that a manufacturer's price differences are least likely to produce the kinds of intra-brand effects the RPA was meant to address, but most likely to coincide with lost sales or profits to inter-brand competitors, the kind of "injury" that was the basis of liability in this case.

The decision below inevitably will push manufacturers toward greater price uniformity and rigidity. It is doubtful that this result will benefit any distributor in the long run; it is *certain* that it will be harmful to consumers. See Hovenkamp, *The Robinson-Patman Act*, *supra*, 68 ANTITRUST L.J. at 127 ("[W]henever anyone takes a longer view than the shortest one possible, incentive discounts further, rather than injure, competition."). Economists and antitrust scholars have achieved a

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[5] No doubt can exist in this case that Volvo does face intense competition from other brands of heavy trucks, and lacks market power in the antitrust sense. Volvo is one of many truck manufacturers and has only a ten percent share of sales. See http://www.todaystrucking.com/trucksales-us.cfm. Reeder made no claim to the contrary.

broad and durable consensus that generalized constraints on pricing flexibility are harmful to the competitive process and to the interests of consumers, regardless of their effects on the commercial interests of individual competitors. "[P]rices may be made more fluid and the general price level in the market *lowered* if the suppliers can vigorously pursue selected buyers with discounts and if major purchasers can use their countervailing power to force producers to grant price concessions." 1 ABA SECTION OF ANTITRUST LAW, THE ROBINSON-PATMAN ACT: POLICY AND LAW 29 (Paul H. LaRue, et al. eds. 1980) (emphasis added) (citing U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 63-64 (1976)). Judge Bork has noted that "adjustment to shifting costs and demand is socially desirable, and it is best that appropriate responses be made as quickly as possible." ROBERT H. BORK, THE ANTITRUST PARADOX 388 (1978). "[R]igid" prices and markets that are "less sensitive to changing demands and costs" are an unhappy result of precluding sellers from "rais[ing] or lower[ing] prices selectively." *Ibid.* See also *id.* at 389-390 (describing pricing flexibility as a protection against cartel behavior). Professor Hovenkamp's treatise summarizes the "voluminous literature" on the means by which price-discrimination laws, if wrongly construed, can "facilitate price rigidity, including oligopoly and collusion." 14 HOVENKAMP, *supra*, ¶ 2340b1, at 121-123.[6]

The Solicitor General, the Antitrust Division, and the Federal Trade Commission have correctly read this Court's precedents to require interpreting the RPA "in a manner that is consistent with the procompetition policies expressed in the antitrust laws." Merits Br. for the United States and Federal

[6] Consistent with the intense competition among manufacturers (see n.5, *supra*), testimony at trial indicated Volvo's need to "adjust its prices to meet competition." "It's a fluid situation * * *. It varies a lot, and not having the ability to adjust to that, I just don't foresee us getting very many deals." C.A. ER 1622 (testimony of Volvo Sales Manager Michael P. Truta).

Trade Commission at 17, *Texaco Inc.* v. *Hasbrouck*, No. 87-2048, available at http://www.usdoj.gov/osg/briefs/1989/sg890525.txt. "[T]he Court has sought to reduce the friction between the [Robinson-Patman and Sherman Acts] by declining to expand the coverage of the Robinson-Patman Act in ways that would 'help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'" *Id.* at 18 (quoting *Automatic Canteen Co.*, 346 U.S. at 63).

3. Damage actions for RPA violations may be filed under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), in any district in which the defendant resides, is found, or has an agent. Under this liberal standard, every manufacturer that distributes its products nationally, or in any smaller region that includes a district within the Eighth Circuit, is subject to lawsuits that will be decided under the Eighth Circuit's erroneous interpretation.

The problem is not just that other defendants may be held liable for behavior that is legal. Far worse, manufacturers will change their pricing policies – by refusing to discount – to avoid the threat of treble-damage liability. All prudent manufacturers seek and follow legal advice to avoid RPA risks. See Joseph, *supra*, ANTITRUST, Summer 2003, at 3 (noting an extraordinary level of interest in publications and seminars devoted to RPA counseling). Faced with the Eighth Circuit's decision, lawyers properly will advise their clients that any price differences now entail serious risks of treble-damage litigation.

Manufacturers cannot avoid this risk merely by charging uniform prices within the Eighth Circuit. Even if they do so, they will still risk RPA liability if their prices within the Eighth Circuit differ from their prices elsewhere, so long as a potential plaintiff can demonstrate its "status" as a competitor to another purchaser, wherever located, that received a price that was different from the price charged in the Eighth Circuit. One predictable result will be less vigorous price competition between

sellers who operate in the Eighth Circuit, even when they are competing elsewhere. See 14 HOVENKAMP, *supra*, ¶ 2340b1. Another result will be to distort competition outside of the Eighth Circuit if one seller operates within the Eighth Circuit, and must adopt uniform pricing or risk RPA liability, while competing against a seller that does not operate in the Eighth Circuit, and thus is free to price flexibly in response to localized competitive conditions.

The RPA is "a statute regarded by many as the antitrust laws' illegitimate child" because it "often operates in ways that are inimical to the goals of the antitrust laws generally." 14 HOVENKAMP, *supra*, ¶ 2300, at 3 & n.1. To the extent that it is the Act itself – not judicial misinterpretation of it – that runs counter to sound antitrust policy, arguments for reform must be addressed to Congress. But cf. *Brooke Group*, 509 U.S. at 220 (quoting *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80 n.13) ("'[T]he Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.'"). Where, as here, however, the Act has been interpreted in an anticompetitive manner only because a court *failed* to heed the intent of Congress as expressed in plain words – words other courts of appeals have understood well – it is this Court, not Congress, that can and should resolve the circuit split, correct the error, and prevent the widespread harm that the judicial error portends.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2005

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-2462

Reeder-Simco GMC, Inc.,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Arkansas.
Volvo GM Heavy Truck	*	
Corporation, now known as	*	
Volvo Trucks North	*	
America, Inc.,	*	
	*	
Appellant.	*	

Submitted: April 15, 2003

Filed: July 12, 2004

Before BYE, RICHARD S. ARNOLD, and HANSEN, Circuit Judges.

BYE, Circuit Judge.

Volvo Trucks North America, Inc. (Volvo) appeals from a judgment entered in the district court[1] in favor of Reeder-Simco GMC, Inc. (Reeder) on claims alleging unfair price discrimination under the Robinson-Patman Act (RPA), 15 U.S.C. § 13, and a failure to deal in good faith and in a commercially reasonable manner under the Arkansas Franchise Practices Act (AFPA), Ark. Code Ann. §§ 4-72-201 through 4-72-209. We affirm.

I

This is an appeal from the denial of a motion for judgment as a matter of law (JAML) following a jury verdict; consequently we recite the evidence in the light most favorable to the verdict holder, Reeder. See Jones v. Swanson, 341 F.3d 723, 731 (8th Cir. 2003).

Reeder sells new and used trucks, including heavy-duty trucks, out of a dealership located in Fort Smith, Arkansas. Volvo manufactures a broad line of heavy-duty trucks for both over-the-road and vocational use (dump trucks, mixer trucks, etc.) In 1995, Reeder signed a franchise agreement with Volvo to become an authorized Volvo truck dealer for a five-year term expiring March 31, 2000. The agreement provided for automatic one-year extensions of the franchise if Reeder met certain sales objectives established unilaterally by Volvo.

The majority of heavy-duty trucks sold by dealers are manufactured only after a retail customer has solicited and accepted bids from several dealers. During this competitive bidding process, dealers seek concessions from Volvo for a price below the initial wholesale price (80% of the published retail price) which then allows the dealers to offer lower prices to their customers. This is an industry-wide practice. To

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[1] The Honorable Robert T. Dawson, United States District Court for the Western District of Arkansas.

remain competitive with other truck manufacturers, Volvo does not reveal its method of calculating concessions. The crux of this case is Reeder's claim that Volvo gave other dealers more favorable price concessions than Volvo granted Reeder, which concomitantly reduced Reeder's profits on successful bids and increased the number of Reeder's unsuccessful bids.

Reeder filed this action in February 2000 alleging Volvo violated the RPA and AFPA and tortiously interfered with Reeders' contracts. The RPA claim alleged both primary-line and secondary-line violations (explained below). The district court granted Volvo's motion for summary judgment on the alleged primary-line RPA violation and claim for tortious interference. The remaining claims – the secondary-line RPA and AFPA claims – were tried to a jury.

Reeder presented the following evidence at trial. In December 1997, Volvo announced the "Volvo Vision" in an email distributed to its dealers, including Reeder. The email had a list of Volvo's challenges, which included "too many dealers" and "under performing dealers." App. 576. The Volvo Vision called for "fewer dealers, larger markets." Id. The email further indicated Volvo wanted to more than double the average market size of its dealers and decrease the number of dealer owners from 146 to 75.

In March 1998, Volvo held its annual North American Dealer Conference in Marco Island, Florida. Marc Gustavson, a Volvo executive, was the conference's keynote speaker. He elaborated on the Volvo Vision by indicating 50% of current Volvo truck dealers would not be in business in the next few years. Unlike Volvo's past annual dealer conferences, where Volvo featured motivational speakers who got dealers "revved up" to sell more trucks, id. at 1119, the featured guest speaker of the 1998 conference was Jon Krakauer, author of "Into Thin Air: A Personal Account of the Mt. Everest Disaster." Krakauer spoke of falling short of his goal to reach the summit of Mt.

Everest and told the dealers sometimes they had to learn to give up without achieving their goals.

Prior to and during this same time frame (1996-1998), Reeder noticed an increase in the sales objectives Volvo expected of it, coupled with a decrease in the pricing concessions it obtained from Volvo. After learning of the Volvo Vision and its stated goal of reducing the number of authorized Volvo dealers, as well as mistakenly receiving faxes from Volvo intended for other dealers which listed larger concessions than Reeder was getting, Reeder came to suspect it was one of the dealers Volvo sought to eliminate.

A. Head-to-Head Competition with Another Dealer for the Same Customer.

Reeder presented evidence that in the summer of 1999, it bid on the sale of twelve trucks to Hiland Dairy Company located in Springfield, Missouri. Reeder requested a 12% concession, but Volvo authorized only 7.5%. Another Volvo authorized dealer, Southwest Missouri Truck Center in Springfield, successfully obtained the Hiland Dairy contract when Volvo granted it an 8.5% concession. As a result of the difference in price concessions, Southwest could offer the Missouri customer a price of $62,890 per truck, while Reeder's price per truck was $63,632.69. Had Reeder obtained the account, it would have realized a gross profit of $30,000 on the sale.

B. Contemporaneous Sales of Like Grade and Quality Trucks in Which Favored Volvo Dealers Received Greater Price Concessions than Reeder.

In March 1998, Reeder successfully bid on the sale of thirty trucks to Lane Freight located in Tulsa, Oklahoma, involving a mixture of over-the-road day-cab and sleeper-cab trucks. Reeder initially requested a 12.51% concession on this sale. When Volvo denied the request, Reeder asked for a 10%

concession on the day-cab trucks and 8.4% on the sleepers. Volvo ultimately granted a 9% concession on both truck types. Two months earlier, Volvo had granted a dealer located in Tyler, Texas, a 12.3% concession on the sale of twelve trucks of like grade and quality to Brookshire Grocery located in Tyler. As a result of the difference in concessions, the price Reeder's customer paid for each truck was $2,606 higher than the price the Texas dealer provided to its customer. Had Volvo offered Reeder the 12.3% concession the Texas dealer received, Reeder would have realized $52,120 in additional profits.[2]

In February 1997, Reeder successfully bid on the sale of two dump trucks to the city of Fort Smith, Arkansas. Volvo granted Reeder a 19% concession on the sale. Three months earlier, Volvo had granted a Kansas City, Missouri, dealer a 21% concession on a sale of two trucks of like grade and quality to Rapidways, a customer located in Kansas City. Once again, had Volvo offered Reeder the same price concession the Kansas City dealer received, Reeder would have realized additional profits for its sale.

In November 1996, Reeder successfully bid on the sale of twenty trucks to New Hi-Way, another Fort Smith customer. Volvo granted Reeder a 24.2% concession on the sale. In February 1997, Volvo granted a Kahoka, Missouri, dealer a 27.3% concession on the sale of five trucks of like grade and quality to Harold Dickey Transport, a customer located in Kahoka. Reeder would have realized higher profits from its

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[2] Reeder also presented evidence showing Lane Freight wanted to add additional trucks to the sale, but Volvo denied Reeder even the original 9% concession, and offered only a 7% concession on the additional trucks. Volvo's conduct caused Reeder to lose profits on the sale of these additional trucks and damaged Reeder's relationship with Lane Freight to the extent that Reeder lost all future sales to Lane Freight.

successful sale had Volvo granted it a price concession similar to the one offered the other dealer.

In February 1996, Reeder successfully bid on the sale of three trucks to Sam Ludington, another Fort Smith customer. Volvo granted Reeder a concession of 13.27% on this sale. At trial, Reeder compared this three-truck sale to three single-truck sales of like grade and quality trucks made by three separate dealers (in Kansas City, Missouri; Sikeston, Missouri; and Memphis, Tennessee) in September 1996, April 1996, and February 1996. In all three instances, the price concessions Volvo granted the other dealers exceeded the price concession given to Reeder, 18.04%, 15.42%, and 14.53%, respectively.

C. Unsuccessful Sales Following Volvo's Refusal to Grant Requested Price Concessions.

In a third category of evidence Reeder presented to prove price discrimination, Reeder recounted numerous situations in which it unsuccessfully requested particular concessions from Volvo to close sales, while during the same time frame Volvo granted higher concessions to other Volvo dealers who were able to close sales. For example, in January 1998 Reeder was working on the sale of 170 trucks to Beach Trucking. Reeder requested a price concession of 26.7%, but Volvo only approved 23.8%. Reeder did not get the Beach Trucking contract. During the same time, Volvo gave another dealer a higher price concession on a smaller number of the same trucks, a 26.1% concession on sixty trucks. The other dealer got its contract. In May 1998, Reeder sought a price concession of 21% on a sale of five trucks. Volvo approved only 2%. Reeder did not get its contract. During the same time, Volvo gave another dealer a 10.6% concession on a sale of three trucks of like grade and quality. The other dealer got its contract.

The jury returned a verdict in favor of Reeder on both claims and awarded damages of $1,358,000 on the RPA claim

and $513,750 on the AFPA claim. The trial court trebled the RPA damages pursuant to 15 U.S.C. § 15a and awarded Reeder attorney fees. Volvo brought a motion for JAML following trial. The district court denied the motion, and Volvo filed a timely appeal with this court.[3]

II

"We review the denial of a motion for JAML de novo." Naucke v. City of Park Hills, 284 F.3d 923, 929 (8th Cir. 2002). Although our review is de novo, a party seeking posttrial JAML, based on the sufficiency of the evidence "faces an onerous burden [because we must] view the evidence in a light most favorable to the jury's verdict [and reverse only] when there is a complete absence of probative facts to support the conclusion reached." Inacom Corp. v. Sears, Roebuck & Co., 254 F.3d 683, 689 (8th Cir. 2001).

A. The RPA Claim

The RPA provides, in pertinent part:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a).

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[3] Reeder did not cross-appeal the district court's grant of summary judgment in favor of Volvo on the alleged primary-line RPA violation.

There are three types of violations under the RPA. Primary-line violations occur when a seller's price discrimination adversely impacts competition with its own competitors. Secondary-line violations occur when a seller's price discrimination injures competition among its customers. Tertiary-line violations occur when a discriminating seller's purchasers do not compete directly, but their customers compete within a unified market region. Godfrey v. Pulitzer Publ'g Co., 161 F.3d 1137, 1140 (8th Cir. 1998) (Godfrey I). In the instant case, Reeder avers a secondary-line violation, claiming Volvo's price discrimination injured competition among Volvo's customers, i.e., Reeder and other Volvo dealers.

To prove its claim, Reeder had to show 1) Volvo discriminated in price between Reeder and the favored dealers, 2) this price discrimination substantially affected competition between Reeder and the favored dealers, 3) the truck sales occurred in interstate commerce, and 4) the trucks sold by Reeder and the other dealers were of like grade and quality. Godfrey v. Pulitzer Publ'g, Inc., 276 F.3d 405, 408 (8th Cir. 2002) (Godfrey II). In addition, because the RPA prohibits price discrimination "between different purchasers," 15 U.S.C. § 13(a), Reeder had to show there were actual sales at two different prices to two different Volvo dealers, i.e., a sale to itself and a sale to another Volvo dealer. Fusco v. Xerox Corp., 676 F.2d 332, 335 (8th Cir. 1982). In other words, as a threshold matter Reeder had to show it was a "purchaser" within the meaning of the RPA. Id. at 334.

1. Two-Purchase Requirement

Volvo contends competitive bidding situations do not implicate the RPA because an unsuccessful bidder is not a purchaser. Volvo emphasizes that much of Reeder's proof involved situations where Reeder did not purchase trucks from Volvo. Reeder did not purchase trucks from Volvo in the head-to-head competition with another dealer for the Hiland Dairy

contract, for example, because the other dealer got the contract. Likewise, Reeder did not actually purchase trucks from Volvo in those situations where Reeder compared its unsuccessful bids to other dealers' successful sales based on better price concessions.

We agree an unsuccessful bidder is not a purchaser within the meaning of the RPA. In Fusco, we said a purchaser is one who actually makes a purchase, not "one who [merely] seeks to purchase, a person who goes into the market-place for the purpose of purchasing." 676 F.2d at 335 (quoting Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 (3d Cir. 1939)). "Thus, a sale at one price plus either an offer to sell at a higher price or a refusal to sell at any price is generally thought not to violate the [RPA]." Id. (citing M.C. Mfg. Co. v. Texas Foundries, Inc., 517 F.2d 1059, 1065 n.11 (5th Cir. 1975)). When Reeder unsuccessfully bid on contracts because Volvo's price concessions were not favorable enough to obtain the contracts, Reeder did not actually purchase trucks from Volvo. Thus, Reeder was not a purchaser in those instances, but merely went into the market-place for the purpose of purchasing. Volvo may have offered to sell trucks to Reeder at a higher price than it offered to other dealers, but mere offers to sell do not violate the RPA.

This conclusion is consistent with the conclusion of many courts that hold price discrimination in the competitive bidding process does not violate the RPA because only one of the two competitors actually makes a purchase. See, e.g., Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604, 615 (4th Cir. 1985) (holding carpet dealer, who alleged carpet manufacturer offered a competing dealer more favorable price quotes during the competitive bidding process for commercial carpet contracts, failed to state a claim under the RPA because the dealer "had not shown, or even alleged, two comparable, completed sales"); Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d

331, 334 (3d Cir. 1939) ("[The RPA] does not compel a seller of commodities to offer them to all persons who may wish to bid upon a contract to resell them to a third party."); Maier-Schule GMC, Inc. v. Gen. Motors Corp., 780 F. Supp. 984, 989 (W.D.N.Y. 1991) (holding truck dealer failed to state an RPA claim against Volvo and other truck manufacturers by offering dealer's three competitors more favorable discounts where plaintiff dealer purchased no trucks during the relevant time period); Olympia Co. v. Celotex Corp., 597 F. Supp. 285, 297 (E.D. La. 1984) ("[T]he Act protects purchasers in competition with one another at the time of the purchases; it is irrelevant that the companies may have entered into competitive bidding, or that the successful bidder was ultimately able to obtain prices below those offered to its competitors in the bidding process."); but see American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919, 924 (5th Cir. 1951) (suggesting an exception to the two-purchase requirement when the plaintiff's failure to purchase is directly attributable to the defendant's discriminatory pricing practice); Indus. Burner Sys., Inc. v. Maxon Corp., 275 F.Supp. 2d 878, 886 (E.D. Mich. 2003) (recognizing the exception and denying summary judgment motion even though RPA plaintiff was nothing more than an unsuccessful bidder).

In this case, however, Volvo concedes Reeder was more than an unsuccessful bidder. Reeder gave four examples where it actually purchased Volvo trucks following successful bids on contracts. Reeder compared those successful sales to actual sales made by other dealers during the same time period (Reeder purchased fifty-five trucks and compared those purchases to other dealers' purchases of twenty-two trucks). Although Volvo challenges the sufficiency of these actual purchase-to-purchase comparisons on other grounds (addressed below), these successful bids clearly gave Reeder "purchaser" status. As a result, it follows Reeder was entitled to pursue a claim for price discrimination under the RPA. See, e.g., DeLong Equip. Co. v. Washington Mills Electro Minerals

Corp., 990 F.2d 1186, 1202 (11th Cir. 1993) (recognizing that even "minimal sales" (i.e., minimal purchases from manufacturer) made by an otherwise unsuccessful bidder are enough for bidder to state an RPA claim).

2. Actual Competition

Volvo argues Reeder failed to show it was in actual competition with the favored dealers. The standard for showing actual competition is whether, "as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market." Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 585 (2d Cir. 1987). Here there is no dispute the dealers all competed at the same functional level, but Volvo contends Reeder did not compete within the same geographic market as the favored dealers. We disagree.

Although Reeder had an assigned geographic area (ten counties in western Arkansas and two counties in eastern Oklahoma), it was free to sell outside that area, and did so. Reeder introduced evidence that it looked to the entire continental United States in making its sales, and had sold or delivered trucks in Arkansas, Oklahoma, Missouri, Texas, Iowa, Illinois, Minnesota, Ohio, Pennsylvania, North Carolina, Georgia, Colorado, and Oregon. Reeder also established that end-buyers of the trucks are very mobile and price-shop nationwide.

Reeder's evidence focused upon sales and bids made in the southwest region of the United States. Reeder presented evidence of sales or bids it made in three states in the southwest region (Arkansas, Missouri, and Oklahoma) and compared the sales or bids to those made by other dealers in four states in the southwest region (Arkansas, Missouri, Texas, and Tennessee). Reeder presented at least two instances where it competed

directly with a favored dealer – the head-to-head competition with Southwest Missouri Truck Center in Springfield, Missouri, for a twelve-truck deal to Hiland Dairy, and a concession request from Reeder for a five-truck deal to Tommy Davidson which also involved a bid made by a Volvo dealer in Springdale, Arkansas. Finally, Reeder presented evidence about Volvo's designated Southwest Region to show there were no natural or physical barriers that would restrict the flow of heavy trucks in commerce or affect the freedom of customers to travel throughout the region to purchase heavy trucks. From this evidence a jury could reasonably decide Reeder was in actual competition with favored dealers. See Godfrey II, 276 F.3d at 411 ("[A]lthough . . . dealers operate in exclusive geographic territories, that fact is not dispositive on the question of competition. Even where parties operate in airtight territories, they compete if the end-buyers of the product can freely travel between the geographic areas to purchase the commodity in question.").

3. Like Grade and Quality; Reasonably Contemporaneous in Time

To establish an RPA violation, Reeder had to show the comparative sales involved trucks of like grade and quality. Id. at 408. Products are not of like grade and quality "if there are substantial physical differences in products affecting consumer use, preference or marketability." Checker Motors Corp. v. Chrysler Corp., 283 F.Supp. 876, 889 (S.D.N.Y. 1968), aff'd, 405 F.2d 319 (2d Cir. 1969). Volvo argues the sales-to-sales comparisons made by Reeder involved trucks with different major components that affected consumer preference and marketability. In support of its position Volvo points to trial testimony which showed differences in truck components influence consumers' decisions to buy – particularly engine types and gear ratios.

Reeder offered testimony, however, showing that any differences in components were inconsequential – in all cases the trucks were the same model and same year, with comparable engines and largely similar components. Also, Reeder provided evidence that the differences in components were taken into account in the calculation of the price quotes and concessions, so the jury could reasonably conclude that when the comparisons involved trucks with somewhat different components, the differences did not substantially affect the concessions Volvo offered.

We note the RPA says the commodities involved must be of *like* grade and quality, not *identical* grade and quality. We have previously indicated the concept "was designed to serve as one of the necessary *rough guides* for separating out those commercial transactions insufficiently comparable for price regulation by the statute." Moog Indus. v. Fed. Trade Comm'n, 238 F.2d 43, 50 (8th Cir. 1956) (quoting the Report of the Attorney General's Nat'l Comm. to Study the Anti-Trust Laws 157 (1955)) (emphasis added). We believe our comments have been correctly interpreted to reflect a "sensible approach," and a "somewhat flexible application" of the like grade and quality concept. White Indus., Inc. v. Cessna Aircraft Co., 657 F. Supp. 687, 698 (W.D. Mo. 1987) (applying Moog).

Here, the jury was instructed on the concept of like grade and quality, and Volvo does not argue the district court erred in its instructions. The jury found by special interrogatory the comparisons involved trucks of like grade and quality. We acknowledge there was conflicting evidence on the substantiality of the differences in components, but there was ample evidence supporting the jury's determination the differences were immaterial. "There was conflicting evidence on this issue, and it could have gone either way. Making decisions of this kind is exactly what juries are for." GLB

Enters., Inc. v. United States, 232 F.3d 965, 969 (8th Cir. 2000) (quotation omitted).

Reeder also had to show the comparative sales were reasonably contemporaneous in time, but "there is no requirement that the two sales be made at precisely the same time or place." DeLong Equip., 990 F.2d at 1202 (11th Cir. 1993). The four sales-to-sales comparisons offered by Reeder were between one and four months apart, with one exception; Reeder compared its three-truck sale to Sam Ludington in February 1996 to three separate one-truck sales by other dealers, and one of those sales took place in September 1996 (another took place in February 1996 and the third in April 1996). Volvo argues the sales were not contemporaneous because as little as a single-month gap could make a substantial difference in the price concession it offered due to changes in model-year availability or backlog or both. Volvo refers us to a part of the trial transcript that says exactly that, as little as a month "*could* make a difference." Volvo's Brief at 35 (referring to App. 1623) (emphasis added). Volvo never presented evidence, however, to show the gaps between the sales comparisons involved in this case *did* make a difference in the price concessions it offered. Again, the jury was instructed on the issue whether the comparative sales occurred at about the same time, found by special interrogatory that they did, and Volvo does not challenge the district court's instructions. Under the standard we must apply in reviewing a motion for JAML, we find no basis for disturbing the jury's verdict.

4. Injury/Damages

a. Competitive Injury

The RPA prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition."

5 U.S.C. § 13(a). The RPA "guards against injury to competition, not injury to individual competitors." Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 387 n.3 (8th Cir. 1987). The RPA does not, however, "require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." Corn Prods. Ref. Co. v. Fed. Trade Comm'n, 324 U.S. 726, 742 (1945).

A plaintiff may demonstrate a reasonable possibility of competitive injury in two ways. "First, plaintiff may introduce direct evidence that disfavored competitors lost sales or profits as a result of the discrimination." Rose Confections, 816 F.2d at 385 (citing Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 437-38 (1983)). In other words, while the RPA does not guard against injury to individual competitors, proving injury to individual competitors is one way to demonstrate a discriminatory practice likely injured competition. "Second, [a plaintiff] can show that the favored competitor received a substantial price reduction over a substantial period of time, which gives rise to a permissible inference of competitive injury." Id. (citing Fed. Trade Comm'n v. Morton Salt Co., 334 U.S. 37, 50-51 (1948)). Volvo argues Reeder failed to demonstrate a reasonable possibility of competitive injury because Reeder did not prove the lower concessions Volvo granted to other dealers drew sales away from Reeder. We disagree.

The evidence presented by Reeder was sufficient for the jury to conclude Volvo's discriminatory concessions resulted in lost profits and sales to Reeder and other dealers, and that favored competitors received substantial price reductions over a substantial period of time. As stated above, Volvo acknowledged in December 1997 that it wanted to cut the number of its dealers in half as part of its "Volvo Vision." At trial, Volvo acknowledged it had, in fact, succeeded in reducing

the numbers of its dealers. While admitting 1998 was a good market for the sale of heavy trucks overall and 1999 was Volvo's "record year," App. 1340, Volvo nevertheless sent approximately twenty termination letters to Volvo dealers in 1999 and early 2000, and placed another twenty or so dealers on probation during the same time period. From this evidence, the jury could properly infer Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices.

Reeder also presented evidence that it lost profits and sales as a result of Volvo's price concession practices. For example, in the head-to-head competition with Southwest Missouri Truck Center for the Hiland Dairy contract, Reeder lost gross profits of $30,000. On the Lane Freight sale, one of the four sales-to-sales comparisons Reeder presented to prove its purchaser status, Reeder lost gross profits of $52,120. Reeder also presented evidence from which the jury could conclude Volvo's discriminatory practice cost Reeder all future sales to Lane Freight. Reeder's evidence showed it lost gross profits on the other sales-to-sales comparisons as well.

Reeder showed its sales of Volvo trucks had been solid prior to the period of Volvo's price discrimination (1996-2000). During the period of discrimination, Reeder's sales decreased substantially and its profit margins were lower despite increased sales efforts. In all, Reeder's gross profits fell from $165,499 in 1996 to $26,327 in 2000. At the time, favored dealer's sales and overall market sales stayed strong. Based on this evidence, the jury could reasonably conclude Reeder's average gross profit was lower than the average of favored Volvo dealers because Volvo discriminated against Reeder in its price concessions.

Reeder also presented evidence that Volvo's practice extended over a substantial period of time (1996-2000). In addition, the evidence established that dealer profit margins

were narrow during that time. Thus, the jury could reasonably conclude even small differences in price concessions had a substantial impact on competition.

b. Actual Injury

Although Reeder only needed to prove competitive injury *may* result to establish a violation of 15 U.S.C. § 13(a), it had to make some showing of actual injury to itself to recover treble damages under 15 U.S.C. § 15(a). See, e.g., J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1539-40 (3d Cir. 1990) (discussing the difference between demonstrating competitive injury under § 13(a) and proving actual injury under § 15(a)). Volvo argues Reeder did not show actual injury because Reeder offered too few examples of Volvo's discriminatory practices, there was no evidence the favored dealers sold the trucks to end-users at lower retail prices, and no evidence the end users selected the favored dealers' bids because of the lower prices. We believe Volvo construes too narrowly the requirements for proving actual injury.

In addressing whether Reeder proved it was actually injured by Volvo's price discrimination, Volvo would have us limit our analysis to the one instance of direct head-to-head competition with Southwest Missouri Truck Center for the Hiland Dairy contract and the four sales-to-sales comparisons Reeder offered to prove its purchaser status, while disregarding all the other evidence offered to prove actual injury. We believe such an approach is inconsistent with the Supreme Court's teachings, both with respect to the role circumstantial evidence plays in RPA claims and the scope of injury to be remedied by the RPA.

Reeder presented other substantial evidence to prove competitive and actual injury. Reeder presented numerous instances of its unsuccessful sales due to Volvo's failure to grant requested price concessions, and evidence of Volvo's admitted intentions to reduce the number of its dealers. Indeed,

Reeder showed Volvo successfully reduced the number of its dealers and placed many more on probation during a "record" sales period. Reeder presented evidence that its own sales and profits were substantially reduced during this boom in the heavy truck industry, despite an increase in its own sales efforts. From this evidence the jury could reasonably infer Volvo's discriminatory practice and Reeder's injuries extended beyond the five specific head-to-head and sales-to-sales comparisons.

In Perkins v. Standard Oil Co., 395 U.S. 642 (1969), the Supreme Court discussed the role of circumstantial evidence in proving the causal connection between a defendant's discriminatory pricing practices and the plaintiff's damages. Perkins, a gasoline retailer, alleged price discrimination between itself and a competitor, Regal, another gasoline retailer far down the distribution ladder from Standard. There was no direct evidence Regal sold the gasoline to its customers at lower retail prices than did Perkins because of the price discrimination, and no direct evidence Regal's customers selected their gasoline over Perkins's because of lower prices. Nevertheless, the Supreme Court upheld the jury's verdict against Standard and in favor of Perkins based no circumstantial evidence.

> If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury. Here the trial judge properly charged the jury that Perkins had the burden of showing that any damage to his business was proximately caused by Standard's price discriminations and there was substantial evidence from which the jury could infer causation. There was evidence that Signal received a lower price from Standard than did Perkins, that this price advantage was passed on, at least in part, to Regal, and that Regal was thereby able to undercut Perkins' price on gasoline. Furthermore, there was

> evidence that Perkins repeatedly complained to Standard officials that the discriminatory price advantage given Signal was being passed down to Regal and evidence that Standard officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices. This evidence is sufficient to sustain the jury's award of damages under the Robinson-Patman Act.

Perkins, 395 U.S. at 648-49 (internal citation omitted).

Likewise, here there was sufficient evidence from which the jury could infer favored dealers received lower prices from Volvo than did Reeder, and this price advantage allowed other dealers to undercut Reeder's prices, hurting Reeder's sales and profits. There was also evidence Volvo was aware this discriminatory practice could destroy Reeder's business; indeed, the elimination of some dealers like Reeder appeared to be Volvo's intent. This is precisely the type of injury the antitrust laws were meant to prevent. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125 (1969) (permitting causality to be inferred from circumstantial evidence where the injury involved was "precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause."). Moreover, Reeder was not required to prove Volvo's price discrimination was the only reason for its injuries, or the only reason for heavy truck customers' purchasing decisions – it was enough that Reeder showed the price discrimination was a "material" cause of its injuries. Id. at 114 n.9 ("It is enough that the illegality is shown to be a material cause . . . a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.")

Volvo would also have us limit the scope of Reeder's injury to the four sales-to-sales comparisons which Reeder presented to prove its purchaser status. The Supreme Court has, however, eschewed an approach whereby damages are mechanically

calculated simply by comparing the price differentials of a defendant's actual transactions between favored and disfavored competitors. "Damages resulting from illegal price discrimination may not be measured merely by determining the overcharge to the disfavored buyer, i.e., the excess paid by disfavored buyer for the goods it purchased." Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1043 (9th Cir. 1988) (citing J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 557 (1981)). Instead, Reeder had both the burden and opportunity of proving damages "on the basis of plaintiff's estimate of sales it could have made absent the violation." J. Truett Payne, 451 U.S. at 565 (citing Zenith Radio, 395 U.S. at 123-24). Thus, Reeder was entitled to present evidence beyond the price differential of the four specific sales-to-sales comparisons it offered to prove its purchaser status, and the jury was free to award damages beyond those transactions.

c. Calculation of Damages

Finally, Volvo challenges the proof Reeder presented to calculate the amount of its damages. We reject this challenge. Having established an actual injury caused by Volvo's antitrust violations, Reeder will not be held to stringent burdens in proving the actual amount of those injuries. See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-66 (1946). The jury may not render its verdict based on speculation or guesswork, but it may make a just and reasonable estimate or approximation. Id.

> [D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other

> causes, that defendants' wrongful acts had caused damage to the plaintiffs.

Zenith Radio, 395 U.S. at 123-24 (citations, internal quotations omitted).

Underpinning most of Volvo's complaints about the calculation of damages is its claim the district court erred in permitting one of Reeder's co-owners, Bill Heck, to testify about Reeder's lost profits and the value of the company. We note the district court has broad discretion in determining whether to admit lay or expert testimony, Anderson v. Raymond Corp., 340 F.3d 520, 523 (8th Cir. 2003); United States v. Oliver, 908 F.2d 260, 263-64 (8th Cir. 1990), and we find no abuse of discretion under these circumstances where Reeder laid the proper foundation to show Heck's knowledge, as a business owner, of the business's value and its lost profits. See Mississippi Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359, 373 (5th Cir. 2002) (collecting cases allowing lost profit testimony where the witness has direct knowledge of the business accounts underlying the profit calculation).

Volvo attacks as pure speculation Heck's use of a multiplier in calculating the value of the Volvo franchise to Reeder. Heck testified multipliers were often used to calculate the value of truck franchises and he selected one based on his knowledge of current practices. Volvo's own experts confirmed multipliers are thus used. The only difference in opinion between Volvo's experts and Heck was which multiplier to use. Volvo's experts would have used a multiplier of two, three or four, while Heck used five. We find Volvo's challenge to Heck's use of a multiplier to be without merit. Volvo does not argue why five in particular was speculative, only that Heck had no basis for choosing it. Indeed, Volvo's experts did not testify five was improper, only that they would have used a lower multiplier. We conclude it was for the jury to determine the relative credibility of the witnesses, and resolve this conflict in the evidence. Furthermore, the district court instructed the jury it

could not award damages based on the value of the lost franchise, and could use that figure only for guidance in determining Reeder's lost profits. Volvo did not object to that instruction, and does not aver error in the instruction.

Reeder further calculated its damages by subtracting its actual sales in the years of Volvo violations (1996-2000) from the sales objectives set by Volvo for those same years. The result represented the number of trucks Reeder argued it would have sold absent Volvo's wrongdoing. That number was then multiplied by Reeder's average gross profits per truck. Reeder also provided alternative evidence of the average gross profits of all Volvo dealers, which when multiplied by the estimated number of lost truck sales, yielded amounts similar to the results obtained when subtracting actual sales from Volvo's sales objectives. From these estimates Reeder subtracted certain expenses, including commissions to salespersons and advertising. Thus, the jury had several reasonable figures from which to choose in calculating damages.

Volvo argues Volvo's sales objectives bore no reasonable relationship to Reeder's lost profits, so it was improper to compare the sales objectives to Reeder's actual sales. But Volvo's own witnesses testified its sales objectives were reasonable. The objectives were calculated using market data and were intended by Volvo to represent a reasonable "minimum performance" expectation of each individual franchise. It was further established at trial Reeder met, and sometimes exceeded, Volvo's objectives before the onset of the alleged price discrimination period.

In sum, we believe Volvo's argument essentially reduces to a demand there be a stronger causal link proved between every dollar of damages awarded and Volvo's antitrust violations. We conclude that argument is inconsistent with the relaxed standard applied to a plaintiff's ascertainment of damages, after having established actual injury. E.g., Bigelow, 327 U.S. at 264-66. The relationship between likely sales and actual sales

is precisely the relationship that should guide an estimate of damages in a price discrimination action. It is imprecise to be sure, but that imprecision cuts against Volvo. See J. Truett Payne, 451 U.S. at 566 ("[I]t does not 'come with very good grace' for the wrongdoer to insist on specific and certain proof of the injury which it has itself inflicted.") (quoting Bigelow, 327 U.S. at 264-65).

B. The AFPA Claim

Volvo contends the district court lacked subject matter jurisdiction over Reeder's AFPA claim. Volvo advances several arguments to support this premise. First, because Reeder's allegations concern the franchise relationship between a motor vehicle dealer and manufacturer, Volvo claims the allegations are governed by the Arkansas Motor Vehicle Commission Act (AMVCA), Ark. Code Ann. § § 23-112-101 through 23-112-706, rather than the AFPA. Volvo contends the AMVCA is more specific than the AFPA as applied to the franchise relationship involved here, and therefore controls. Next, Volvo argues Reeder must exhaust its administrative remedies before the Arkansas Motor Vehicle Commission (Commission) before filing a civil action for a violation of the AMVCA. Finally, Volvo contends the AMVCA requires Reeder to prove a "willful" violation of its provisions before recovering damages in a civil action, see Ark. Code Ann. § 23-112-05, and Reeder's sole source of statutory remedies are comprised in the AMVCA's remedy provisions. We disagree with Volvo's ultimate contention – that the district court lacked jurisdiction – because we disagree with each of Volvo's arguments.

Volvo's first argument is the AMVCA is more specific than the AFPA as applied to the franchise relationship between a motor vehicle dealer and manufacturer, and because the two statutory schemes conflict, the AMVCA should govern. See, e.g., Valley Nat'l Bank of Ariz. v. Stroud, 711 S.W.2d 785, 786 (Ark. 1986) ("In statutory construction where specific

expressions conflict with general expressions, the rule is to give greater effect to the specific expression.").

We have doubts about which of the two statutory schemes is more specific as applied to the franchise relationship between a motor vehicle dealer and a manufacturer. The AMVCA is a regulatory statute governing the relationships not only between dealers and manufacturers, but also salespersons, lessors/lessees, distributors and their representatives, factories and their representatives, and others in the motor vehicle industry. The AMVCA empowers the Commission to set professional standards and grant and revoke licenses. Thus, while the AFPA is broader in the sense it covers all franchise relationships, not just those involving motor vehicle dealers and manufacturers, the AMVCA is broader in that it covers all relationships in vehicle sales, not just franchise relationships. The relationship between Volvo and Reeder falls in the confluence of the two statutes.

We need not resolve which of the statutes is more specific than the other as applied to this fact pattern, however, because we conclude Volvo's first argument fails based on the application of other principles. Clearly, both statutory schemes relate to the subject matter of franchise relationships between motor vehicle dealers and manufacturers, and those we must read them "in a harmonious manner if possible." City of Fort Smith v. Tate, 844 S.W.2d 356, 359 (Ark. 1993) ("All statutes on the same subject are *in pari materia* and must be construed together and made to stand if capable of being reconciled."). Arkansas law further directs us to "view[] them [i.e., the two statutory schemes,] as a single system, and giv[e] effect to the general purpose of the system." Arkansas County v. Desha County, 27 S.W.3d 379, 383 (Ark. 2000).

The AMVCA specifically allows for the courts, not the Commission, to award damages and attorney fees to a licensee harmed by willful violations of the statutory scheme. See Ark. Code. Ann. § 23-112-105. Likewise, the AFPA provides a civil

remedy for franchisees harmed by franchisors acting in a commercially unreasonable manner. See Ark. Code. Ann. § § 4-72-206 (making it unlawful for franchisors to "refuse to deal with a franchise in a commercially reasonable manner") & 4-72-208 (providing a private right of action to franchisees harmed by a violation of the AFPA). Thus, we have little trouble concluding both statutory schemes give persons or entities harmed by a violation of the statutes the right to sue in court, and at least one purpose of the overall system seems to be to protect persons or entities like Reeder from persons or entities like Volvo. We therefore find no conflict between the remedies provisions of the two statutes, and see no reason why a franchisee/licensee like Reeder could not choose to pursue remedies under either statutory scheme.

Furthermore, assuming arguendo a conflict between the two remedial statutes, we believe AFPA's would control because it was enacted two years after the AMVCA. See Kyle v. State, 849 S.W.2d 935, 937 (Ark. 1993) ("The settled rule of statutory construction is that if two legislative acts relating to the same subject are in conflict with each other, the later act controls."). The AFPA refers to three specific franchise situations where the Arkansas legislature directed it would not apply. See Ark. Code Ann. § 4-72-203 (indicating the AFPA does not apply to "franchises subject to the provisions of § 4-702-401 et seq. and § 4-72-501 et seq., or which are subject to the Federal Trade Commission [Franchise Rule], 16 C.F.R. 436.1 et seq."). Notably absent is a reference to franchises subject to the provisions of the AMVCA. Because the Arkansas legislature expressly noted those situations where the AFPA would not apply, we conclude it would have expressly referred to the AMVCA if it intended franchises covered by both Acts to be limited to the remedies available under the AMVCA. See Chem-Ash, Inc. v. Ark. Power and Light Co., 751 S.W.2d 353, 354 (Ark. 1988) ("It is fundamental statutory construction law that the express designation of one thing may properly be construed to mean the exclusion of another.").

Volvo's next argument is that Reeder must exhaust the administrative remedies established by the AMVCA before filing this civil action against Volvo. Again, we disagree. The Commission's power is limited to granting injunctions,[4] revoking licenses,[5] or imposing fines payable to the state treasury,[6] so the Commission could not award damages to Reeder. Exhaustion of administrative remedies is not required if those remedies are inadequate. See, e.g., Cummings v. Big Mac Mobile Homes, Inc., 980 S.W.2d 550, 552 (Ark. 1998) (holding plaintiffs not required to exhaust remedies with the Arkansas Manufactured Home Commission when the Commission only provided damages for the cost of repairs and the plaintiffs asserted their mobile home was beyond repair); Delta Sch. of Commerce, Inc. v. Harris, 839 S.W.2d 203, 207 (Ark. 1992) ("Inadequate administrative remedies need not be exhausted.").

Finally, since the AMYCA requires Reeder to prove a willful violation of its provisions before recovering damages in a civil action, Volvo posits Reeder should not be entitled to recover damages under the AFPA's less-stringent standard. As stated above, however, we see no conflict between the two statutory schemes. And as we noted, the Arkansas legislature specifically mentioned those situations where the AFPA would not apply and did not refer to franchise situations governed by the AMVCA. From this we discern no legislative intent to limit the remedies of motor vehicle franchisees to the more stringent standard required by the AMVCA.

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[4] Ark. Code Ann. § 23-112-104.

[5] Ark. Code Ann. § 23-112-308.

[6] Ark. Code Ann. § § 23-112-205 & 23-112-309.

In sum, the AMVCA did not impose an impediment to Reeder's suit for damages under the AFPA, and the district court had jurisdiction over this matter.

III

We affirm the judgment entered in the district court in all respects.

HANSEN, Circuit Judge, concurring in part and dissenting in part.

Although I do not disagree with the court's resolution of the state law issue, I write separately to express my view that Reeder has failed to make out a claim under the Robinson-Patman Act. Even viewing all of the evidence in the light most favorable to the verdict, I conclude that Reeder cannot prove the necessary elements to recover treble damages in this case. Specifically, Reeder has not proven a violation of § 13(a) because the facts fail to show injury or likelihood of injury to actual competition between Reeder and the "favored" Volvo dealers. Furthermore, even if we assume that Volvo violated § 13(a), there is absolutely no indication that any such violation was the cause of Reeder's injury, for the purpose of recovering damages under § 15(a). I therefore respectfully dissent from Section II(A) of the court's opinion.

There is little doubt that the facts of this case fail to fit neatly into the framework that courts have established in analyzing Robinson-Patman Act secondary-line claims. Much of my disagreement in this case stems from what I perceive as the court's attempt to fit a square peg into a round hole. Traditional RPA cases involve sellers and purchasers that carry inventory or deal in fungible goods. By contrast, the parties in this case operate in a unique marketplace where special-order products are sold to individual, pre-identified customers only after competitive bidding. By its very nature, this process will never produce the kind of competition the RPA was designed to protect because it will never result in the type of two-

purchase transaction that itself creates a market for the goods that are sold. Indeed, where, at the time of the end purchase, only one possible seller and one possible buyer exist, competition is totally absent. It is the nature of competitive bidding, not price discrimination, that makes it so.

The court properly recognizes that a competitive bidding situation will never involve two "purchasers," and thus always will fall outside of the purview of the RPA. Despite this determination, however, the court goes on to conclude that Reeder's purchases with respect to four transactions give it "purchaser status" as to separate instances in which it did not make a purchase, and therefore was not in fact a purchaser. I disagree with this proposition. Reeder cannot piggyback nonpurchaser transactions onto purchaser transactions for purposes of recovering under the RPA. My concern does not stem from a strict adherence to the two-purchase requirement, but rather from my belief that "purchaser status" is inextricably intertwined with the existence of actual competition and the possible threat thereto. Because my primary objection to the court's opinion is that it overlooked this important aspect of actual competition, I turn next to that issue.

Despite the fact that Reeder operates at the same functional level as the "favored" Volvo dealers and that they may do business in the same or overlapping geographic areas, I nevertheless conclude that Reeder has failed to prove that it was in actual competition with the "favored" Volvo dealers. There certainly may exist a national market in which heavy-truck dealers compete to receive the opportunity to bid on potential sales to customers. The Volvo dealers in this case very well may have competed against each other in this market on a regular basis. However, any difference in price that Volvo eventually may quote to a dealer who actually bids on a potential sale has no effect on this market. The evidence shows that an end user's decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation, and

cold calling or other marketing strategies initiated by individual dealers. Once bidding begins, however, the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale. Cf. FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968) (Section 2(d) "reaches only discrimination between customers competing for resales at the same functional level...."). Thus, although Reeder and other "favored" dealers may have competed generally with each other in the larger market for obtaining bids, there is evidence of only two occasions where Reeder competed with a "favored" Volvo dealer for an actual sale. Reeder's attempt to compare a sale that it made to one end user to a sale made by a "favored" Volvo dealer to another end user with whom Reeder had no relationship simply is not relevant to proving a violation of the RPA because there was no actual competition between the two dealers at the time of the sales to the separate and different end users.

Without proof of actual competition, Reeder cannot demonstrate a reasonable possibility of competitive injury. Indeed, where alleged lost sales or profits were not diverted from Reeder to "favored" Volvo dealers, but rather to other non-Volvo dealers, it is unclear how any difference in price offered by Volvo to its two dealers could possible injure actual competition between them. See Falls City Indus., 460 U.S. at 437-38 (finding competitive injury based on direct evidence of sales diverted away from plaintiff to a favored customer). Even if Volvo's calculation of concessions caused Reeder to lose profits or sales, there is no violation of the RPA if there is no injury to competition between Reeder and the "favored" Volvo dealers. Furthermore, Volvo can successfully rebut any Morton Salt inference of injury to competition between Reeder and the "favored" Volvo dealers because the evidence clearly establishes that none of the lost sales or profits was diverted from Reeder to those "favored" dealers. Although Volvo's conduct may have injured Reeder's ability to compete with non-Volvo dealers, Reeder must look outside the RPA for any relief

for this claimed injury. Contrary to the court's assertion, such an injury is not the type of injury to competition that the RPA was intended to prevent.

It is my view that an injury to competition can be proven only where the factors necessary to state an RPA claim all are present in the same relevant transaction. To the extent that the court looks for the existence of one factor in one transaction and the existence of another factor in a second transaction, I conclude that the proof in this case is too tenuous and requires too many inferences piled atop inferences to reach the court's result.

Nevertheless, even if we assume that Volvo violated § 13(a) of the RPA, I would reverse Reeder's RPA damage award because Reeder has failed to prove that it was actually injured by Volvo's price discrimination as required by § 15(a). See J. Truett Payne, 451 U.S. at 562 ("To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."). Although Reeder may have established that it lost sales and profits to other non-Volvo competitors, there can be no inference of actual injury for the purpose of the RPA without some evidence (and there is none in this record) that the discriminatory pricing caused those sales and profits to be diverted from Reeder to another Volvo dealer who received more favorable terms from Volvo.

Reeder relies on four different scenarios to demonstrate actual injury and to calculate its damages. First, Reeder points to instances in which it bid unsuccessfully against non-Volvo competitors because Volvo failed to quote Reeder the same concession that it gave to a "favored" Volvo dealer in a separate sale to a different end user. Second, Reeder cites instances in which it bid successfully against non-Volvo competitors but did not make as much in profit on the successful deal because it did not receive the same concession that a "favored" Volvo dealer received in an entirely separate sale to an entirely different end

user. Third, Reeder relies on the transaction involving Tommy Davidson in which Reeder and another Volvo dealer, who allegedly received a better concession quote from Volvo, both lost the ultimate sale to a non-Volvo competitor. Finally, Reeder cites to the deal involving Hiland Dairy in which Reeder and another "favored" Volvo dealer both received equal concession quotes from Volvo and submitted equal bids to the same end user. Months later after Volvo's prices had increased, Hiland Dairy placed its order with the "favored" Volvo dealer for reasons unrelated to price, but insisted on receiving the original lower price. The other dealer then requested an additional concession in order to offer Hiland Diary its original quoted price. Notably, Hiland Dairy purchased all of its trucks both before and after this transaction from the same "favored" Volvo dealer. More notably, there is nothing in the evidence to show that had Hiland Dairy made the same request of Reeder that Volvo would not have "favored" Reeder with the same concession in order to get the business.

Although it is possible that Reeder lost sales or profits to non-Volvo dealers because it did not receive a sufficiently high concession from Volvo in the first three scenarios, the difference in concessions offered to Reeder and the "favored" Volvo dealers did not cause the lost sales or profits on those deals. In order to prove that the § 13(a) violation caused its injuries, Reeder essentially must show that absent a price difference, it would not have lost those sales or profits. However, even if Volvo had not offered the "favored" dealers greater concessions, i.e., not discriminated, there still is no proof that Reeder would have made the sales. Furthermore, as to the sales that Reeder did make, it would be improper to calculate lost profits based on what Reeder otherwise characterizes as illegal price discrimination.

The fact that the sales and profits were not diverted from Reeder to "favored" Volvo dealers demonstrates not only a lack of causation of actual injury under § 15(a), but also seriously undermines our court's conclusion that there is any likelihood

of injury to competition between Reeder and the "favored" Volvo dealers. Reeder alleges that Volvo intended to put Reeder out of business. While intent may be relevant to prove a primary-line violation, see Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet, 824 F.2d 582, 595-96 (8th Cir. 1987), cert. denied, 484 U.S. 1010 (1988), it offers nothing in this case. At most, the facts show that Volvo acted unreasonably in failing to give Reeder sufficient concessions to allow it to compete with other non-Volvo dealers. While such conduct may very well give rise to some sort of liability under state law, I conclude that it does not support a judgment for treble damages under the Robinson-Patman Act. I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

REEDER-SIMCO GMC, INC. PLAINTIFF

V. Civil No. 00-2031

VOLVO GM HEAVY TRUCK CORPORATION n/k/a/ VOLVO TRUCKS NORTH AMERICA, INC. DEFENDANTS

JUDGMENT

On the 1st day of March 2002, there came on for consideration the plaintiff's post-verdict motion for treble damages and attorney's fees and costs. For the reasons set forth in the memorandum opinion filed concurrently herewith, the Court finds that the motion should be and hereby is GRANTED.

WHEREFORE, in accordance with the verdict of the jury, (Doc. #94), and the Court's order of January 25, 2002, (Doc. #95), final judgment should be entered in favor of the plaintiff and against the defendant as follows:

IT IS HEREBY ADJUDGED AND DECREED that the plaintiff is awarded damages in the amount of $513,750.00 for its claim under the Arkansas Franchise Practices Act.

IT IS FURTHER ADJUDGED AND DECREED that the plaintiff is awarded damages in the amount of $4,074,000.00 (trebled from the jury award of $1,358,000.000) on the price discrimination claim brought pursuant to the Robinson-Patman Act.

IT IS FURTHER ADJUDGED AND DECREED that, as the prevailing party, the plaintiff is awarded a reasonable attorney's fee of $171,095.00 and $25,175.42 in costs.

Said damage awards shall bear interest at the annual rate of 2.24% from January 24, 2002, the date of the jury's verdict, until paid. The awards for reasonable attorney's fees and costs shall bear interest at the rate of 2.24% per annum from the date of entry of this order until paid.

IT IS SO ORDERED.

/S/ [Robert T. Dawson]
ROBERT T. DAWSON
United States District Judge

[FILED: MAR O1 2002]

[ENTERED ON DOCKET: 3/1/02]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

REEDER-SIMCO GMC, INC. PLAINTIFF

V. Civil No. 00-2031

VOLVO GM HEAVY TRUCK CORPORATION n/k/a VOLVO TRUCKS NORTH AMERICA, INC. DEFENDANT

ORDER

On this 30th day of April 2002, there came on for consideration the Defendant's renewed motion for judgment as a matter of law or, in the alternative, motion for a new trial or remittur. (Doc. #102). After reviewing the motion, plaintiff's response thereto, and defendant's reply, and based upon the prior rulings of this Court and being well and sufficiently advised, the Court makes its order as follows:

The renewed motion for judgment as a matter of law should be and hereby is DENIED for the same reasons stated on the record during the trial;

The motion for a new trial should be and hereby is DENIED, because no good cause has been shown; and

The motion for remittur should be and hereby is DENIED, because the damage award is not excessive or conscience shocking.

IT IS SO ORDERED.

[FILED: MAY 1 2002]

/S/ [Robert T. Dawson]
Robert T. Dawson
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

REEDER-SIMCO GMC, INC. PLAINTIFF

V. Civil No. 00-2031

VOLVO GM HEAVY TRUCK CORPORATION n/k/a/ VOLVO TRUCKS NORTH AMERICA, INC. DEFENDANT

ORDER

On the 14th day of January 2002, this matter came on for trial to a duly selected jury consisting of eight members, the Honorable Robert T. Dawson presiding. The trial continued over from day to day until the afternoon of January 23, 2002. The case was submitted to the jury on interrogatories and a unanimous verdict was reached as to each interrogatory as follows:

INTERROGATORY NO. 1: Do you find from a preponderance of the evidence that Plaintiff sustained damages?

ANSWER: Yes.

INTERROGATORY NO. 2: Do you find from a preponderance of the evidence that Defendant or Defendant's officer or employee, directly or indirectly, refused to deal with Plaintiff in a commercially reasonable manner and in good faith (see Jury Instruction No. 12)?

ANSWER: Yes.

INTERROGATORY NO. 3: Do you find from a preponderance of the evidence that Plaintiff sustained damages proximately caused by Defendant's conduct?

ANSWER: Yes.

INTERROGATORY NO. 4: If you conclude that Plaintiff is entitled to a verdict under the Arkansas Franchise Practices Act and you answered "yes" to Interrogatory Nos. 1, 2, and 3, then what do you determine to be a fair dollar calculation of the damages incurred by Plaintiff because of Defendant's violation of the Arkansas Franchise Practices Act? (Remember that conduct occurring before February 9, 1997 may not be considered in determining the amount of Plaintiff's damages under the Arkansas Franchise Practices Act.)

ANSWER: $513,750.00

INTERROGATORY NO. 5: Do you find from a preponderance of the evidence that, in one or more instance, the comparative sales by Defendant to Plaintiff and other Volvo dealer occurred at about the same time (see Jury Instruction No. 15)?

ANSWER: Yes.

INTERROGATORY NO. 6: Do you find from a preponderance of the evidence that, in one or more instance, the reasonably contemporaneous, comparative sales by Defendant to Plaintiff and another Volvo dealer involved trucks of like grade and quality (see Jury Instruction No. 16)?

ANSWER: Yes.

INTERROGATORY NO. 7: Do you find from a preponderance of the evidence that, when comparing the reasonably contemporaneous sales of trucks of like grade and quality, Defendant charged different prices to different purchasers in the sales transactions (see Jury Instruction No. 17)?

ANSWER: Yes.

INTERROGATORY NO. 8: Do you find from a preponderance of the evidence that there is a reasonable possibility that discriminatory pricing may harm competition between plaintiff and other retail dealers of Volvo trucks (see Jury Instruction No. 18)?

ANSWER: Yes.

INTERROGATORY NO. 9: Do you find from a preponderance of the evidence that Plaintiff was injured in its business or property because of the Defendant's discriminatory pricing (see Jury Instruction No. 19)?

ANSWER: Yes.

INTERROGATORY NO. 10: Do you find from a preponderance of the evidence that Defendant acted in good faith to meet a competitor's equally low and lawful price when it offered discriminatory prices to certain other retail Volvo dealers?

ANSWER: No.

INTERROGATORY NO. 11: If you conclude that the Plaintiff is entitled to a verdict for price discrimination under the Robinson-Patman Act, what do you determine to be a fair dollar calculation of the damages incurred by Plaintiff because of the price discrimination? (Remember that conduct occurring before February 9, 1996 may not be considered in determining the amount of Plaintiff's damages under the Robinson-Patman Act.)

ANSWER: $1,358,000.00

WHEREFORE, for purposes of any appeal that may be taken from this verdict, this order does not constitute the final judgement in this case. Before a final judgment may be entered, the Court must determine whether Plaintiff may be entitled to an award of treble damages and/or attorneys' fees and costs for either of its claims in accordance with the jury verdict. Accordingly, the Court makes its order as follows:

IT IS ORDERED that within ten days Plaintiff shall submit a brief together with any documentary evidence, including affidavits, that the Plaintiff would have considered by the Court in deciding whether to award treble damages and/or attorneys' fees and costs. The Defendant shall have ten days thereafter to submit its own brief and documentary evidence.

IT IS SO ORDERED.

/S/ [Robert T. Dawson]
Robert T. Dawson
United States District Judge

[FILED: JAN 25 2002]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

REEDER-SIMCO GMC, INC. PLAINTIFF

V. Civil No. 00-2031

VOLVO GM HEAVY TRUCK CORPORATION n/k/a VOLVO TRUCKS NORTH AMERICA, INC. DEFENDANT

ORDER

On this 3rd day of January 2002, there comes on for consideration the motion for summary judgment filed by Defendant. (Doc. #56). The Court, after a review of the pleadings in the light most favorable to the nonmoving party as required, finds that the motion should be and hereby is GRANTED in part and DENIED in part.

Defendant's motion for summary judgment addresses Plaintiff's claims under the Robinson-Patman Act for primary-line, as well as, secondary-line discrimination. In order to prove primary-line discrimination, Plaintiff must show it was a competitor of Defendant for the direct sales the defendant allegedly made to consumers. Even if Defendant offered Plaintiff the same price as it allegedly offered consumers in direct sales, Plaintiff would have to charge a higher price to the consumers in order to make a profit. *See* Deposition of Bill Hek, Vol. II, p. 345. In such an instance, Plaintiff could not successfully compete with Defendant. Accordingly, Plaintiff is unable to prove primary-line discrimination by Defendant, and summary judgment is appropriate on this claim. *See Conoco, Inc. v. Inman Oil Company, Inc.*, 774 F.2d 895, 903-04 (8th Cir. 1985).

Defendant also moves for summary judgment on Plaintiff's claim for tortious interference with a contractual relationship or business expectancies on the basis that it is barred by the statute of limitations. Plaintiff's response to the summary judgment motion does not address this contention. After viewing the evidence in the light most favorable to Plaintiff, as required, the Court finds that Plaintiff's alleged cause of action for tortious interference accrued more than three years before the filing of its complaint on February 9, 2000. Therefore, Plaintiff's claim for tortious interference should be and hereby is dismissed.

As for the remaining claims of secondary-line discrimination under the Robinson-Patman Act and the violations of the Arkansas Franchise Practices Act, the Court finds there are issues of fact which preclude summary judgment, including, but not limited to, whether Defendant made sales at different prices to two different buyers in violation of the Robinson-Patman Act, whether the alleged lower prices were functionally available to Plaintiff, whether Plaintiff competed within the same geographic market as the allegedly favored purchases and whether Defendant dealt with Plaintiff in a commercially reasonable manner and in good faith as required by the Arkansas Franchise Practices Act.

As reflected above, the motion for summary judgment should be and hereby is GRANTED in part and DENIED in part. Accordingly, Plaintiff's claims for primary-line discrimination under the Robinson-Patman Act and for tortious interference with a contractual relationship or business expectancies are DISMISSED WITH PREJUDICE, but all other claims remain set for the jury trial on January 14, 2002.

IT IS SO ORDERED.

/S/ [Robert T. Dawson]
Honorable Robert T. Dawson
United States District Judge

[FILED: JAN 03 2002]

[ENTERED ON DOCKET:
1/3/02]

APPENDIX F

UNITED STATES COURT OF APPEALSX
FOR THE EIGHTH CIRCUITX

X
No. 03-2462X
X
Reeder-Simco GMC, Inc., *X
*X
Appellee, *X
* Order Denying Petition forX
vs. * Rehearing and for RehearingX
* En BancX
Volvo GM Heavy Truck *X
Corporation, etc., *X
*X
Appellant. *X
X

The motion by the Truck Manufacturers Association toX file an amicus brief has been considered by the court and isX denied.X
X

The petition for rehearing en banc is denied. The petitionX for rehearing by the panel is also denied.X
X

Judge Gruender would grant the petition for rehearing enX banc.X
X

Judge Hansen would grant the petition for panel rehearing.X
X
(5128-010199)X
X

October 6, 2004X
X
X
Order Entered at the Direction of the Court:X
X

X
Clerk, U.S. Court of Appeals, Eighth CircuitX

Supreme Court, U.S.
FILED
FEB 2 - 2005
OFFICE OF THE CLERK

No. 04-905

In The

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent objects to the statement of questions presented by Petitioner pursuant to S.Ct.R. 15.

The U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") stated below that "as a threshold matter Reeder had to show it was a purchaser within the meaning of the RPA [Robinson-Patman Act] . . . [w]e agree an unsuccessful bidder is not a purchaser within the meaning of the RPA . . . mere offers to sell do not violate the RPA . . . ." Pet. App. 8a, 9a.

Volvo has misstated the Eighth Circuit's true holding by asserting that the opinion holds that an unaccepted offer can violate the RPA.

Section 2 of the Clayton Act, which originally prohibited price discrimination only where its effect "may be substantially to lessen competition" was amended by Congress through the Robinson-Patman Act, in an effort to strengthen the scope of the Act, by adding the following conjunctive, alternative standard (hence the conjunction "or"): "or [where the effect may be] to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

In addition, Volvo's reasons for granting a petition for a writ of certiorari rely upon a misstatement of the relevant provisions of the RPA, by seeking to omit the provisions of the Act which provide for the ability of a plaintiff to establish an inference of competitive injury from evidence of a substantial price difference between purchasers over time, as announced in *FTC v. Morton Salt*, 334 U.S. 37 (1948).

PARTIES TO THE PROCEEDING

The Petitioner is Volvo Trucks North America, Inc., Defendant-Appellant in the courts below. The Respondent, Plaintiff-Appellee in the courts below, is Reeder-Simco GMC, Inc.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Reeder-Simco GMC, Inc. has no parent corporation. It is a privately held corporation having only the following shareholders: David Reeder, William E. Heck and Hershel Cole.

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OPINIONS BELOW

Petitioner accurately set forth the opinions of the lower courts in its Appendix.

RELEVANT PROVISIONS

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it unlawful "to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition, . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

Petitioner omitted the "meeting competition" defense provision of the Robinson-Patman Act, which essentially renders Petitioner's argument fatally incomplete: "Nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor."

STATEMENT OF THE CASE

Contrary to Volvo's assertion, the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") did not "extend the reach" of the Robinson-Patman Act ("RPA"). The court relied upon settled authority consistent with its prior opinions, the decisions of other circuits, and this

Court.[1] In fact, the majority below cites with approval most of the cases claimed by the Petitioner to present a conflict.[2] It is clear that the Eighth Circuit did not create "new law," but applied the law, as announced in long-accepted precedent, to the specific facts in this case.

Petitioner's statement of the case cannot be accepted because it omits substantial evidence demonstrating the diversion of sales and profits to favored Volvo dealers, and includes the misstatement that "the alleged discrimination did not cause, and could not have caused a diversion of sales or profits to a favored purchaser." Pet. 7. To reach this conclusion, Petitioner would have the Court limit its view of the evidence to a select few of the sales transactions presented at trial. In addition, Volvo's assertion that its product pricing practices are "similar in all material respects" to Ford's pricing practices is also a misstatement.[3]

---

[1] The Eighth Circuit denied Volvo's petition for rehearing and petition for rehearing en banc, in which Volvo asserted that its opinion was in conflict with its decisions in *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987); *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986); and *FTC v. Morton Salt*, 334 U.S. 37, 43 (1948). Pet. App. F. Volvo has now chosen a new set of cases on which it claims a conflict.

[2] The Eighth Circuit majority cited with approval the following: *Terry's Floor Fashions, Inc. v. Burlington Indus. Inc.*, 763 F.2d 604 (4th Cir. 1985) (Pet. App. 9a); *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 n.11 (5th Cir. 1975) (Pet. App. 9a); *Shaws, Inc. v. Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939) (Pet. App. 9a); and *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987) (Pet. App. 11a).

[3] Volvo cites *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999) (Pet. p. 4), which is easily distinguished because in *Ford*, there was no evidence

(Continued on following page)

Stripped to its core, Volvo's true attack on the Eighth Circuit's holding is its unsupported assertion that the Eighth Circuit's conclusions on the sufficiency of the evidence are wrong. As such, it presents a purely factual issue that does not justify this Court's review. *See* Opinion, Pet. App. 7a. The factual issues were determined by a jury, and therefore can be set aside only if there is a complete absence of probative facts to support the conclusion it reached. *Id.* Accordingly, we will provide an overview of some of the pertinent evidence related to Reeder's status as a purchaser, competitive injury, and diversion of sales or profits.

Reeder's evidence of the various actual sales comparisons (in which Reeder was, in fact, a "purchaser"), involving Reeder's sales to Lane Freight, City of Fort Smith, New Hi-Way, and Sam Ludington not only establish that Reeder lost sales as a result of Volvo's price discrimination, but also that Volvo's price discrimination was substantial and existed over a period of several years. Volvo's discriminatory pricing concessions also damaged Reeder's relationship with Lane Freight, which had a 180-truck fleet, and prevented Reeder from obtaining any more sales from Lane Freight, resulting in Reeder losing profits on further sales to Lane. A. 1218-21.

Reeder presented abundant evidence that, over a four-year period, Volvo continually and repeatedly sold trucks of like kind and quality to favored dealers at substantially lower prices than those sold to Reeder, diverting sales and

---

that the Ford dealer received *unequal* price concessions. In fact, the dealer conceded that the discounts were available to it on an equal basis with other Ford dealers. *Id.* at 326. Obviously, Reeder did not so concede.

lost profits from dealers like Reeder to favored dealers such as Westfall Volvo in Kansas City. For example, Reeder presented evidence that the Kansas City dealer known as "Westfall Volvo" was shown to consistently receive greater discounts than Reeder in at least five reasonably contemporaneous and comparative transactions spanning from 1996 through at least February of 1999. Tr. 159-61; Pl. Ex. 130, 131; Tr. 173-76; Pl. Ex. 124, 124B, 125, 125A; Tr. 183-85; Pl. Ex. 121, 122; Tr. 231-33; Pl. Ex. 148, 149; Tr. 253-54, 256; Pl. Ex. 174, 175, 177. The Westfall dealer in Kansas City was the dealership where Mike Truta, Reeder's "district sales manager" spent most of his time. Tr. 98. Under Volvo's system of granting discounts, the dealer initially submits his request to the district sales manager, who grants a level of discount, guided in part, upon the number of units and the particular model truck, but beyond that, the discount is determined subjectively, based only on the "district manager's discretion." A. 1531. Chris Patterson, Volvo's Vice-President of Sales and Marketing, confirmed the fact that Volvo's decentralized and subjective system of granting discounts through district sales managers does, in fact, result in a disparity of discounts among the dealers within a district. Tr. 505; Patterson Depo. pp. 99-103. Another Volvo representative stated that Volvo makes no effort to attempt to equalize the discounts among dealers, except when the same end user is identified in a transaction. Tr. 768. Reeder's representative contrasted the Volvo system to the system used by GM, where a district sales manager's discretion does *not* have an impact on discounts, and where equal availability of concessions was assured through a centralized location, without regard to a particular dealer's request for concession. Tr. 97. Volvo's representative also stated that "a very high proportion of

our trucks have been sold through a very small number of our dealers . . . making us more dependent on a smaller number of very good dealers, like . . . Kansas City . . . ." Tr. 505; Patterson Depo. p. 143.

Plaintiff showed diversion of sales and profits resulting from price discrimination by comparing Reeder's sales and profits to the sales and profits of the favored Volvo dealers. Reeder also showed that despite its increased sales efforts, Reeder's sales decreased substantially and its profit margins were lower during the period of Volvo's price discrimination (1996-2000), even though favored Volvo dealers' sales and overall market sales were strong during the same time period. Reeder's sales of Volvo trucks historically (prior to the period of price discrimination) had been good. *See* P. Ex. 268, a summary of its operating reports. A. 1360. As shown on P. Ex. 268, and as explained by Reeder's representative, total Volvo units sold per year by Reeder declined from 66 units in 1996 to only 8 units in 2000. A. 1360. Reeder's gross profits on Volvo truck sales fell from $165,499 in 1996 to $26,327 in 2000. Pl. Ex. 268; A. 1044. *See also* P. Exs. 272, 272a, 277. A. 1044-48. Reeder presented evidence that its average gross profit was lower than the average of other Volvo dealers because Reeder was not able to receive the same pricing concessions. A. 1373. Reeder also introduced various examples of lost potential sales resulting from Volvo's illegal pricing concessions that prevented Reeder from obtaining the level of concession needed to actually make the particular sale. A. 1273-1325.

Volvo's director of dealer development testified that 1998 was a good market for the sale of heavy trucks and that 1999 was Volvo Truck's "record year." A. 1340. Indeed, Volvo's senior vice-president for sales explained that the

truck market in 1999 was "inflated beyond reason" and production rates remained quite high through the third quarter of 2000. Tr. 516, Patterson Depo. p. 116. A Volvo representative testified at trial that competition in heavy truck sales has been high since 1996 and profit margins in the heavy truck business have been relatively low since 1996. A. 1620.

Reeder's representative testified that the heavy truck sales market (excluding Reeder's experience) in 1998 and 1999 was well on its way to achieving all-time record volume. A. 1357. In addition, it was taking longer for Volvo to get new orders out of the factory and the lead time between the time when a dealer ordered a truck and when the truck was built and shipped was getting longer and longer because its plant was operating at full capacity. A. 1357. During this time, competition was keen and dealer profit margins were narrow. A. 1620. Thus, the jury could find that even small differences in prices or concessions could adversely affect competition and cause lost sales and profits.

Reeder's sales efforts increased dramatically during the period of Volvo's price discrimination. In response to the "Volvo Vision," Reeder opened a new facility across the street from the dealership to be devoted exclusively to Volvo heavy truck sales and hired additional salesmen, all with the approval of Volvo. A. 1125-27. In addition, Reeder continued its efforts with respect to his established accounts. A. 1185. Indeed, Reeder presented evidence that it prepared and submitted bids to customers for the sale of over 3,300 Volvo heavy trucks from the period of mid-1997 through November 1999. Pl. Ex. 277. Despite Reeder's increased sales efforts and the fact that favored Volvo dealers were selling a record number of Volvo heavy

trucks, Reeder's sales and profit margins declined during the period of discrimination.

Moreover, Reeder presented testimony that Volvo's price discrimination actually harmed competition. The testimony of Chris Patterson, Volvo's Vice-President of Sales and Marketing, provides substantial evidence of diversion of sales from Reeder to other Volvo dealers. Volvo announced at a dealer meeting in 1997 that "50 percent of the Volvo truck dealers would not be in business in the next few years." Patterson Depo. p. 108-09. Patterson then confirmed that the "Volvo Vision," as expressed in an email distributed to the Volvo dealers (Pl. Ex. 101), was an accurate statement of the "Volvo Vision." Patterson Depo. p. 114-15. The email had a list of Volvo's challenges, which included "too many dealers" and "under performing dealers." The Volvo Vision called for "fewer dealers, larger markets." The email further indicated Volvo wanted to more than double the average market size of its dealers and decrease the number of dealer owners from 146 to 75. *Id.*, Pet. App. 3a.

Patterson explained that the Volvo Vision of reducing the number of Volvo dealers was what Volvo management saw as necessary to "secure higher levels of profitability for a dealership and for the manufacturer," due to compressed profit margins. Patterson Depo. p. 115. Patterson acknowledged that the number of dealerships was, in fact, reduced. Patterson Depo. p. 115. He testified that in 1999 or early 2000, approximately twenty "termination letters" were issued to Volvo dealers and that another "twenty or so" were placed on probation. Patterson Depo. p. 142. Significantly, Volvo sent Reeder a termination letter, effective March 31, 2000. Pl. Ex. 54; A. 1353-55. The fact that profits or sales from Reeder were diverted to favored

dealers is tied together from Mr. Patterson's statement that "a very high proportion of our trucks have been sold through a very small number of our dealers . . . making us more dependent on a smaller number of very good dealers, like . . . Kansas City . . . ." Tr. 505; Patterson Depo. p. 143.

The trial court submitted the case on special interrogatories to the jury, which was given ample evidence on which to base each of its findings, specific to the pertinent elements of the RPA, and which resulted in the judgment being entered in favor of Reeder. The Eighth Circuit opinion affirming the judgment does not conflict with any relevant precedent. Pet. App. B, C.

ARGUMENT

I. The Eighth Circuit Did Not Hold That A Mere Offer Can Violate The Robinson-Patman Act.

Volvo is simply in error when it states that the Eighth Circuit has extended the Robinson-Patman Act by "ignoring" two principles, to-wit:

(a) that "liability cannot arise from a discriminatory offer to sell that does not result in a purchase"; and,

(b) the RPA protects "competition between favored and disfavored purchasers."

Pet. 2. Petitioner's assertion is clearly a misstatement when one considers the following statements from the opinion of the Eighth Circuit: "To prove its claim, Reeder had to show 1) Volvo discriminated in price between Reeder and the favored dealers, 2) this price discrimination substantially affected competition between Reeder

and the favored dealers, ..." Pet. App. 8a. "[M]ere offers to sell do not violate the RPA" Pet. App. 9a.

> In this case, however, Volvo concedes Reeder was more than an unsuccessful bidder. Reeder gave four examples where it actually purchased trucks following successful bids on contracts. Reeder compared those successful sales to actual sales made by other dealers during the same time period . . . .

Pet. App. 10a.

The Eighth Circuit obviously did not "ignore" the principles that Petitioner asserts as grounds for granting certiorari. The Eighth Circuit clearly did not hold that an unaccepted discriminatory offer, without two consummated purchases at different prices, can violate the RPA. Instead, the Court accurately stated the law and applied the facts to the law in a manner that is not in conflict with any other circuit. In fact, the majority opinion cites most of the cases relied upon by the Petitioner in asserting a "conflict." Petitioner simply cannot establish that the decision of the Eighth Circuit fits any of the criteria set out in S.Ct.R. 10 so as to merit this Court granting certiorari. This Court will not grant a writ of certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S.Ct.R. 10.

The Eighth Circuit's decision plainly does not rest upon Volvo's unaccepted offers to sell alone. Nevertheless, Petitioner cites *Terry's Floor Fashions, Inc. v. Burlington*

Indus. Inc., 763 F.2d 604, 615 (4th Cir. 1985), in support of its position that the Eighth Circuit's holding is somehow in conflict with that opinion. However, the Eighth Circuit opinion actually cited *Terry's Floor Fashions*, 763 F.2d at 615, in support of its explanation that "mere offers to sell do not violate the RPA." Pet. App. 9a. Petitioner argues that because the plaintiff in *Terry's Floor Fashions* was once a purchaser of defendant's products, its holding cannot be distinguished on the basis of "Reeder's status as a purchaser." Pet. 13. The key difference between this case and *Terry's Floor Fashions* is that in *Terry's Floor Fashions*, the plaintiff "had not shown, or even alleged two comparable, completed sales." 763 F.2d at 615. Although the plaintiff in *Terry's Floor Fashions* may have shown it was a previous "purchaser" of defendant's product, it failed to compare such prior purchase to a reasonably contemporaneous sale of goods of like kind and quality to another competing purchaser. Reeder obviously alleged and presented evidence of at least four comparable completed sales, in which Reeder, and other Volvo dealers were "purchasers." As correctly stated by the Eighth Circuit: "Volvo concedes Reeder was more than an unsuccessful bidder. Reeder gave four examples where it actually purchased Volvo trucks. Reeder compared those successful sales to actual sales made by other dealers during the same time period." Pet. App. 10a.

Petitioner next contends that the Eighth Circuit's opinion is in conflict with *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976). However, the Eighth Circuit also cited *M.C. Mfg. Co.* in agreement with the principle that "an unsuccessful bidder is not a purchaser within the meaning of the RPA." Pet. App. 9a. Again, the Petitioner

claims that because the plaintiffs in *M.C. Mfg. Co.* had made a prior purchase, its holding cannot be distinguished on the basis of Reeder's status as a purchaser. A conflict arises for purposes of certiorari decisions when "two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Stern, et al., Supreme Court Practice 226 (8th ed. 2002). Simply stated, no conflict exists between *M.C. Mfg. Co.* and the Eighth Circuit opinion below. To the contrary, *M.C. Mfg. Co.* is readily distinguishable on different facts and a different legal issue.

In *M.C. Mfg. Co.*, the plaintiff made its sole purchase from the defendant manufacturer under a June, 1970 contract, and was merely an unsuccessful bidder in connection with a December, 1971 contract (over a year and a half later). These were the only two transactions compared through evidence at trial. The plaintiff argued that because it purchased additional parts through a purchase order from the seller in furtherance of its 1970 contract, whereby the delivery of such goods would be "reasonably contemporaneous" to the delivery of goods to a rival purchaser who won the December 1971 contract, such purchase would qualify as a purchase "in competition" with the rival purchaser sufficient to implicate the RPA. The court disagreed, noting that the "legality of price discrimination between contracts to purchase that contemplate contemporaneous delivery must be evaluated as of the dates the respective contracts were made," as opposed to delivery dates. 517 F.2d at 1066 n.13. The court also stated that, "each contract represented a separate, distinct market open only to a single producer." 517 F.2d at 1067. The court in *M.C. Mfg. Co.* was careful to note that its holding was limited to the specific facts presented,

stating, "because the particular facts underlying this case are crucial to our resolution of the controversy, a detailed review of the events leading to selection of a contractor on government contract No. [] is warranted." 517 F.2d at 1062. In addition, the court distinguished its holding from its own decision in *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951), recognizing that the specific facts presented did not conflict with the holding in *Bruce's Juices* that an exception to the two purchase requirement may exist "where competitors in the same market are engaged in competitive purchasing and selling at the time of the price discrimination and where the failure of the plaintiff to consummate a second purchase of the item discriminatorily priced is directly attributable to defendant's own discriminatory practice." 517 F.2d at 1067 n.17.

It cannot be seriously disputed that Reeder was a purchaser on at least four discriminatory, comparable sales to other Volvo dealers, meeting all of the criteria to implicate the RPA. Pet. App. 2a-10a. The Eighth Circuit recognized and adhered to the law that a discriminatory offer does not violate the RPA. Petitioner's first reason for granting certiorari is without merit.

II. The Eighth Circuit Did Not Err In Holding That Reeder-Simco Presented Sufficient Evidence Of Competitive Injury Or The Likelihood Of Diverted Sales.

Distilled of rhetoric, Petitioner's second point of argument actually boils down to whether Reeder presented sufficient evidence of "competitive injury" at trial. Petitioner begins its argument by first omitting pertinent provisions of the RPA, and misstating the Eighth Circuit's holding and

analysis concerning Reeder's proof of competitive injury. Pet. 15-16. Petitioner quotes only a portion of the RPA, arguing that the RPA only protects competition "with any person who ... knowingly receives the benefit of such discrimination." Pet. 15.[4] The pertinent provisions of the RPA (highlighting the parts omitted by Petitioner) are actually stated as follows:

> (a) **Price; Selection of Customers.** It shall be unlawful for any person engaged in commerce ... either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where *either* or any of the purchases involved in such discrimination are in commerce ... *and where the effect of such discrimination may be substantially to lessen competition* ...
>
> ***or*** ...
>
> to injure, destroy or prevent competition with any person who *either grants or* knowingly receives the benefit of such discrimination, *or with customers of either of them* ....

15 U.S.C. § 13(a) (*emphasis added*).

---

[4] Petitioner continues to repeat and emphasize the part of the RPA which allows for – but does not require – a showing of competitive injury by showing that the effect of discrimination may be "to injure, destroy or prevent competition with any person who ... *knowingly receives the benefit of* such discrimination." (Pet. i, 1, 8, 11, 15). Petitioner fails to cite any authority to support the notion that Reeder was required to demonstrate that another Volvo dealer knew it received the benefit of the discriminatory pricing in order to assert its claim against Petitioner Volvo. Reeder did not sue the other Volvo dealers who may or may not have known that they were receiving the benefit of Volvo's discriminatory pricing.

Thus, the Petitioner would have this Court ignore two separate, conjunctive clauses of the RPA, allowing for two, additional means of showing the prohibited "effect" of price discrimination. First, examine the meaning of "or with customers of either of them." Plainly, this refers to (1) customers of the person granting the discrimination, *and* (2) customers of the person receiving the benefit of discrimination. Here, Reeder is a "customer" of the person who grants discriminatory pricing – Volvo. The RPA therefore allows for liability upon a showing that the effect of the price discrimination "may" injure competition with *Reeder* – a "customer" of Volvo. "Fairness and protection of secondary-line purchasers are the concerns of the Robinson-Patman Act, a conclusion that is confirmed by the language of the statute, legislative history, and judicial precedent."[5] *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (9th Cir. 1995), *cert. denied*, 516 U.S. 987 (1995). Reeder is clearly the secondary line purchaser. Volvo's focus on Reeder's customer – the end user in the "tertiary line" – is misplaced.

[5] Section 2 of the Clayton Act, which originally prohibited price discrimination only where its effect . . . "may be substantially to lessen competition . . . ," was amended by Congress through the Robinson-Patman Act, in an effort to strengthen the scope of the Act, by adding the following conjunctive, alternative standard (hence the conjunction "or"): "or [where the effect may be] to injure, destroy or prevent competition with any person who *either grants* or knowingly receives the benefit of such discrimination, *or with customers of either of them*." "The purpose of this passage was to relieve secondary-line plaintiffs – small retailers who are disfavored by discriminating suppliers – from having to prove harm to competition market wide, allowing them instead to impose liability simply by proving effects to individual competitors. H. R. Report No. 2287, 74th Cong. 2d Sess. 8 (1936). As the House Report stated: 'The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern *is injury to the competitor victimized by the discrimination*'." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 n.18 (9th Cir. 1995), *cert. denied*, 516 U.S. 987 (1995) (*emphasis added*).

Petitioner erroneously attempts to argue that the *only* method by which competitive injury may be proven is by direct evidence of diverted sales. Accordingly, it is *Petitioner* who seeks a holding inconsistent with other circuits and this Court. For example, Petitioner's argument completely ignores this Court's holding in *FTC v. Morton Salt*, 334 U.S. 37, 50, 68 S.Ct. 822, 830 (1948). In this case, the Eighth Circuit specifically found that Reeder presented sufficient evidence to meet what has become commonly known as the "*Morton Salt* inference" stating: "The evidence presented by Reeder was sufficient for the jury to conclude Volvo's discriminatory concessions resulted in lost profits and sales to Reeder and other dealers, and that favored competitors received substantial price reductions over a substantial period of time." Pet. App. 15a. *Morton Salt* was a secondary line price discrimination case where this Court determined that the Robinson-Patman Act was "especially concerned with protecting small business," and therefore Section 2(a) was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination" (quoting S. Rep. No. 1502, 74th Cong., 2d Sess. 4). "*Morton Salt* permits an inference of injury to competition from evidence of a substantial price difference over time, because such a price difference may harm the competitive opportunities of purchasers, and thus create a 'reasonable possibility' that competition itself may be harmed." *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 142 (2d Cir. 1998).

"The existence of [actual] competition is essentially a fact question which can only be determined by making a realistic appraisal of *all* of the relevant competitive facts." *Ag-Chem Eq. Co., Inc. v. Hahn, Inc.*, 480 F. 2d 482, 490 (8th Cir. 1973), *citing FTC v. Sun Oil Co.*, 371 U.S. 505, 527 (1963). The Petitioner attempts to compartmentalize the evidence of competition, separating each discriminatory transaction into a sealed container, hoping to avoid an open view of the whole picture. While Petitioner tried to emphasize the evidence of head-to-head competition (where Reeder and another Volvo dealer attempted to resell to the same exact customer at the same time) in its discussion of the "two purchase" requirement, Petitioner conveniently omits such discussion in claiming that there is insufficient evidence of injury to competition. Clearly, the evidence in this case is not limited to the events of Reeder losing sales to another Volvo dealer in "head-to-head" competition. However, such incidents are not "irrelevant" to the issue of whether Reeder established a likelihood of injury to competition. One reason for the introduction of such evidence (among substantial other evidence[6]) was to establish that Reeder and the other Volvo dealers were in actual competition with each other.

Petitioner states that "other circuits have held that a disfavored purchaser-plaintiff must prove that it competes against favored purchasers because such competition is an essential predicate for . . . competitive injury . . . ." Pet. 17. The Eighth Circuit's holding in this case is no different, as shown from the Court's pronouncement that: "To prove its

[6] For example, Volvo's representative admitted that Volvo dealers even outside a given district or region compete for sales with Volvo dealers within another district or region. Tr. 587-88.

claim, Reeder had to show (1) Volvo discriminated in price between Reeder and the favored dealers, (2) this price discrimination substantially affected competition between Reeder and the favored dealers . . . ." Pet. App. 8a. Where is the conflict? The Eighth Circuit properly stated and followed the same legal principle Petitioner claims to have been rejected by the Eighth Circuit.

The Eighth Circuit discussed substantial evidence presented by Reeder to establish actual competition, competitive injury, and the competitive nexus, which evidence more than distinguishes the cases cited by Volvo to assert a "conflict." Pet. App. 2a-20a. Contrary to Petitioner's assertion, the evidence in this case went way beyond the evidence presented in *Best Brands*, *M.C. Mfg. Co.*, *Allen Pen*, and *Stelwagon Mfg.* The shotgun approach taken by Petitioner in asserting a conflict with other opinions necessitates a response as to each case.

The Eighth Circuit's holding does not conflict with the Second Circuit's holding in *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987). To the contrary, the opinion below actually quotes *Best Brands*, 842 F.2d at 585, with approval in describing the test for whether a competitive nexus was shown, as follows: "The standard for showing actual competition is whether, 'as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market.'" *Id.* Pet. App. 11a. The Eighth Circuit applied and followed the same legal principles announced in *Best Brands*, but affirmed the judgment in favor of Reeder, finding sufficient evidence of actual competition and competitive injury, in contrast to the lack of evidence shown by the disfavored purchaser in *Best*

Brands. The distinguishing facts in *Best Brands* were succinctly described by the Second Circuit as follows:

> Best's trial evidence regarding actual competition was sparse. In fact, some evidence presented by Best seemed to contradict inferential evidence that actual competition existed. According to the weight of the evidence, the markets assigned to Best and Southland were exclusive, and neither Southland, nor Best, nor customers of either of them, engaged in competition within the other's territory. Indeed, even [in] . . . the area most susceptible to interterritory competition – *no evidence* was presented suggesting that Best, Southland, or their customers, made purchases in the other's territory, or otherwise competed therein.

Best Brands, 842 F.2d at 585 (*emphasis added*).

In contrast to the lack of evidence of actual competition shown in *Best Brands*, the Eighth Circuit discussed the substantial evidence presented by Reeder that it was in actual competition with other, but favored, Volvo dealers, including, without limitation, the situations of head-to-head competition with other dealers and from the analysis of Reeder's sales and bids compared to sales made by other Volvo dealers in the same geographic territory. Pet. App. 11a-15a.[7]

[7] In addition, unlike the *distributors*, in *Best Brands*, which have "exclusive territories," the Volvo *dealers* do *not* have exclusive territories, but may, and do sell to customers outside their district or region. Note 4, *supra*. Also, unlike many distributors, Volvo dealers *purchase* trucks for resale – they are a "customer" and not a mere conduit for distribution.

Petitioner also asserts that the opinion conflicts with the Fifth Circuit's holdings in *M.C. Mfg. Co.* (discussed *supra*), and *Infusion Resources, Inc. v. Minimed, Inc.*, 351 F.3d 688 (5th Cir. 2003), *cert. denied*, 124 S.Ct. 2881 (2004). As previously discussed, the Eighth Circuit cited *M.C. Mfg. Co.* with approval; but the result is readily distinguished on the facts, as is *Infusion Resources*. The court in *Infusion Resources* found that the plaintiff, in seeking to avoid summary judgment completely failed to submit *any* evidence that the alleged competitors of the plaintiff were "favored purchasers" at the time of the alleged price discrimination. Reeder, on the other hand, submitted substantial evidence that it did compete with favored Volvo dealers. For example, Reeder demonstrated that it competed in the same sales district as one of its rivals, Westfall Volvo, in Kansas City. Tr. A. 1221-22; A. 1571. Reeder made several comparisons of its purchases to the purchases of Westfall Volvo, where Westfall was shown to have received discriminatory prices. At trial, Reeder's representative discussed the invoices reflecting Volvo sales to Westfall Volvo, which was shown to consistently receive greater discounts than Reeder in at least five reasonably contemporaneous and comparative transactions spanning from 1996 through at least February of 1999. Tr. 159-61; Pl. Ex. 130, 131; Tr. 173-176; Pl. Ex. 124, 124B, 125, 125A; Tr. 183-185; Pl. Ex. 121, 122; Tr. 231-233; Pl. Ex. 148, 149; Tr. 253-254, 256; Pl. Ex. 174, 175, 177.[8] The Eighth Circuit agreed that the evidence presented at trial was sufficient

[8] Evidence that Volvo's discriminatory pricing caused the diversion of sales or profits to other Volvo dealers, including, for example, diversion of sales to Westfall Volvo, is briefly discussed above in Respondent's Statement of the Case; however, brevity requires the omission of additional facts.

to satisfy the *Morton Salt* inference, *and* the diversion of sales or profits caused by the discrimination.

The Petitioner next claims that the Eighth Circuit's decision conflicts with the First and Third Circuits' holdings, stating that "damages cannot be recovered for a violation of the RPA without proof that the price discrimination harmed the plaintiff's ability to compete against favored purchasers." Pet. 20. First, the Eighth Circuit did *not* hold that damages can be recovered without evidence of actual injury. Petitioners position is, again, a misstatement, in light of the evidence discussed above, and under the Eighth Circuit's analysis of the evidence and clear conclusion that "here, there was sufficient evidence from which the jury could infer favored dealers received lower prices from Volvo than did Reeder, and this price advantage allowed other dealers to undercut Reeder's prices, hurting Reeder's sales and profits." Pet. App. 19a.

Petitioner first cites *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981), in which the question was whether a private plaintiff was required to show actual injury to recover damages. The First Circuit quoted this Court's holding in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), that a private treble damage plaintiff "must make some showing of actual injury attributable to a violation of the RPA." 653 F.2d at 22. The Eighth Circuit clearly followed the same principles of law as set forth in *Allen Pen* and described the substantial evidence – both direct and circumstantial – which plainly distinguishes this case factually from the insufficient evidence presented in *Allen Pen*. The Eighth Circuit also followed and cited *J. Truett Payne*, correctly stating that the law required Reeder to "make some

showing of actual injury to itself to recover treble damages." Pet. App. 17a.

In *Allen Pen*, the defendant argued that the purchaser produced no evidence from which a jury could conclude that it was injured by the price discrimination. The court agreed, finding the following facts particularly significant (653 F.2d at 21-23):

> (a) the purchasers total purchases from the seller "amounted to no more than 1½ to 2% of [the purchasers] total sales" – "the affected sales were but a tiny fraction of its total business";
>
> (b) the purchaser showed no absolute drop in sales; and,
>
> (c) the purchaser remained free to buy similar products from the seller's competitors.

In our case, however, Reeder established that heavy truck sales were a very important component of its overall sales. Instead of the 1½ to 2% in *Allen Pen*, Volvo heavy truck sales amounted to approximately twenty percent (20%) of Reeder's overall sales at the beginning of Volvo's discriminatory practices. Tr. 320-36. Also, during the time period in which the discriminatory conduct occurred, Reeder's overall sales decreased substantially and its profit margins were lower than from before such conduct, in contrast to favored Volvo dealer's record sales and higher profit margins (A. 1360, A. 1044, A. 1340, A. 1357, A. 1370-74, Tr. 516, A. 1185, A. 1125-27); and Reeder's average gross profit was lower than the average Volvo dealer's gross profit because Reeder was not able to receive the same pricing concessions (A. 1373). While the plaintiff purchaser in *Allen Pen* could readily purchase office supplies from other

suppliers, Reeder relied upon Volvo exclusively for its heavy truck sales. The Eighth Circuit discussed substantial additional evidence in the opinion reasoning that Reeder did prove actual injury. Pet. App. 14a-20a.

Petitioner incorrectly claims that the Eighth Circuit's opinion is in conflict with the Third Circuit's opinion in *Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996). Once again, the Eighth Circuit opinion does not adopt any principle of law in contrast to the Third Circuit, but is faced with the application of facts clearly distinguishable from the *Stelwagon Mfg.* case.

In *Stelwagon Mfg.*, the court found that the evidence presented at trial was insufficient to show a causal link between the plaintiff's decline in sales and the price discrimination. In fact, the only evidence submitted by the plaintiff in *Stelwagon Mfg.* linking the Robinson-Patman violation to any decline in sales or profits was anecdotal testimony that should have been ruled inadmissible. The court noted that "[n]ot only did Stelwagon fail to offer any documentary evidence as to the effect of the discrimination on resale prices, it also failed to identify a single lost customer." 63 F.3d at 1276. The evidence in *Stelwagon Mfg.* is sharply contrasted to the evidence in this case, where Reeder presented substantial documentary evidence on its lost sales and decreased profit margins, in comparison to the increase in sales and higher profit margins of the favored Volvo dealers (discussed *supra*, pp. 3-8). Reeder presented substantial evidence on specific incidences of lost sales due to the discriminatory prices charged by Volvo. As recognized by the Eighth Circuit, "Reeder presented evidence that its own sales and profits were substantially reduced during this boom in the heavy

truck industry despite an increase in its own sales efforts." Pet. App. 18a. The Eighth Circuit's opinion is entirely consistent with this Court's explanation of the required burden of proof of causation under Section 4 of the Clayton Act as follows:

> In the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendant's wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendant's wrongful acts had caused damage to the plaintiffs.

J. Truett Payne Co. Inc. v. Chrysler Motors Corp., 451 U.S. 557, 565-66 (1981).

A primary flaw in Petitioner's argument is that it misconstrues or ignores the substantial evidence that Volvo's discrimination in prices did, in fact, cause the diversion of sales and profits to favored dealers. The Petitioner proceeds with its argument as if there is a complete absence of evidence of diversion of sales or profits, which is absolutely not the case. The evidence in this case showed that Volvo's practice completely eliminated Reeder's ability to compete against favored purchasers in that Reeder's franchise with Volvo was terminated. Tr. 332.

The RPA prohibits price discrimination between two purchasers, regardless of the identity of the purchaser's customer or "end user," as long as the sales to such purchasers are "reasonably contemporaneous," and the products sold are of "like grade and quality." Nevertheless, Petitioner adopts Judge Hansen's dissent, which would

impose a new requirement of purchasers having *identical* customers, at the exact same time, instead of the accepted and logical requirement of similar group of customers (i.e. the same "customer *dollar*," not "same customer"), at "reasonably contemporaneous" times. Petitioner's argument and approach conflicts with the accepted analysis of actual competition from established precedent and overlooks the purpose and practicality of the "meeting competition" defense available under § 2(b) of the RPA.

The Federal Trade Commission and this Court have concluded that the RPA has a primary basis on one fundamental principle: "Congress intended to assure, to the extent reasonably practicable, that businessmen at the *same functional level* would start on *equal* competitive footing so far as price is concerned." *In re Boise Cascade Corp.*, 107 F.T.C. 76, 205 (1986), *quoting FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963). Obviously, as retailers engaged in the sale of Volvo heavy trucks, the favored Volvo dealers and Reeder competed on the same functional level. *See Eastern Auto Distributors v. Peugeot Motors Amer.*, 795 F.2d 329, 335 (4th Cir. 1986). It is established and recognized by overwhelming authority that once a plaintiff makes a showing that it competes on the same functional level, the next inquiry is whether the competitors also compete in the same geographic territory – an element beyond dispute in this case. *Best Brands Beverage v. Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987). The RPA says absolutely nothing about the concept that the customers must be *identical*, nor is it found in any legislative history of the Act. It is not surprising that neither Volvo, nor Judge Hansen, in the dissent, cite any authority directly requiring the secondary line purchasers (Reeder and other Volvo dealers) be involved in a sale to

the exact same customer. The Eighth Circuit's opinion cannot possibly conflict with non-existent contrary authority. In fact, the overwhelming authority holds that the plaintiff needs to show only that the sales were "reasonably contemporaneous." *See FTC v. Bordon Co.*, 383 U.S. 637, 643-44 (1966); *Black Gold Ltd. v. Rockwool Indust., Inc.*, 729 F.2d 676, 683 (10th Cir. 1984); *Zwicker v. J. I. Case Co.*, 596 F.2d 305, 309 (8th Cir. 1979); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1572 (N.D. Ga. 1992).

It has been repeatedly recognized that "determining the presence or absence of functional competition between purchasers of a commodity is simply a factual process which focuses on whether these purchasers were directly competing for resales among the same *group* of customers." *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 141 (2d Cir. 1998); *see Texaco, Inc. v. Hausbrouck*, 496 U.S. 543, 554 (1990). The fact that Reeder and other Volvo dealers were involved in competitive bidding situations does not change the fact that they were continually after the same customer dollar from the same *group* of customers – end users of heavy duty trucks. It defies logic to impose a requirement of showing that Reeder and another Volvo dealer must be attempting to sell to the *exact same* customer, when accepted precedent provides that the RPA is implicated when there are reasonably contemporaneous sales ("exactly contemporaneous" sales are not required), and that the sales must involve products of "like grade and quality" (not the "same" product). Volvo's argument "writes out of the statute the requirement of 'reasonably contemporaneous sales' and 'like grade and quality,' and writes into the law a requirement that the plaintiff prove 'coincidental sales or

bids' of the 'exact same products.' This Court has already rejected the equivalent of [Volvo's] 'equalization' defense outright." James A. Pikl, *The Myth of "Functional Availability" and the Robinson-Patman Act*, 2002 Fed. Cts. L. Rev. 1, p. 113, *citing Texaco, Inc. v. Hausbrouck*, 496 U.S. 543, 556-58 (1990).

Volvo essentially claims, without citation or authority, that the RPA is simply inapplicable to all competitive bidding situations. The problem with Volvo's argument is apparent when one considers the "meeting competition" defense, which was available to Volvo at trial, but which was rejected by the jury. The meeting competition defense is established for the purpose of competitive bidding situations, and allows a defendant such as Volvo to avoid liability where it can show that its lower price "to *any* purchaser *or* purchasers was made in good faith to meet an equally low price of a competitor ...." 15 U.S.C. § 13(b). If "actual competition" is defined so as to *never* include the situation of competitive bidding, then the "meeting competition" defense becomes mere legislative surplusage. Clearly, the RPA actually addresses competitive bidding situations by including the meeting competition defense.

Petitioner's essential argument was also addressed in *Industrial Burner Systems, Inc. v. Maxon Corp.*, 275 F. Supp. 878, 886 (E.D. Mich. 2003), in which the court criticized the case of *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), stating:

> [T]his approach unnecessarily blends the "separate purchaser" requirement found in the second price discrimination factor, with the competitive injury requirement found in the fourth factor. More importantly, this interpretation overlooks the practical impact of the competition in the bidding process – the relevant competitive market – by focusing on the after-the-matter "purchase." In a bid-contract structure, this purchase is, for the purposes of the competition for the bid, a second symbolic purchase.

The *Maxon* court pointed out additional reasons for distinguishing the *M.C. Mfg.* case, which are equally applicable here, and importantly pointed out that the loss to the unfavored purchaser is not limited to the situation where such purchaser has made an after-the-matter "purchase" of the components. *See also Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653 (9th Cir. 1997), *cert. denied*, 522 U.S. 943 (1997).

Petitioner's argument is premised entirely on the unsupported assertion that "actual competition" means that Reeder and the other Volvo dealers with which it competes must be bidding for the same customer on the same truck to trigger the Act's protection. Any such requirement would open a vast loophole in the RPA. It would enable a manufacturer of any product to establish different pricing schemes for different dealers, similarly situated, with impunity; so long as Dealer A (the disfavored dealer) could not point to customers who actually shopped among those dealers – including both Dealer A and Dealer B – and chose to buy a given unit from Dealer B who received a lower price from the manufacturer, there would be no RPA violation. The result would clearly be to lessen competition, because Dealer A would be driven out of business. Dealer A would be without customers, solely because of the discriminatory pricing. Yet, according to Volvo, all this is perfectly proper. But, as we have shown, and as the Eighth Circuit correctly holds, this is not the law.

This point is well made by James A. Pikl, *The Myth of "Functional Availability" and the Robinson-Patman Act*, 2002 Fed. Cts. L. Rev. 1 (Jan. 2002), where the author states:

> Where price discrimination is allowed to take place, suppliers who sell to retailers can dictate which retailers get lower prices and which pay higher prices. Over time, such favoritism will eventually put the disfavored retailers out of business, all the while harming the disfavored buyers' customers who are often paying higher prices than they otherwise would. The disfavored retailers go out of business because they cannot forever resell at the same low price as the favored retailers. The market is then left with a monopolist in charge of supply.

Id. at 17. That is exactly what Volvo seeks.

III. The Eighth Circuit's Opinion Will Not Be Harmful To Competition.

Petitioner argues that the effect of the decision in the instant case will be to reduce competition and result in higher prices because manufacturers will choose to establish uniform prices which will be higher than if they can "selectively" discount their competitive bids. This argument conflicts with Volvo's admission at trial, where Volvo's Vice-President of the Southeast Region said that Volvo's discounting methodology is used because it allows Volvo to sell at a higher profit to someone who will pay more. (Tr. 763) Volvo simply wants to be able to engage in discriminatory pricing for the sake of its own profits – not for "consumer welfare." Nothing in the RPA or the Eighth Circuit opinion prohibits a seller from offering its products at different prices to different buyers, so long as the reason

for such difference is legitimate (e.g., "cost justification" or "meeting competition").

Volvo's final argument not only ignores the availability of the "meeting competition" defense, but also seeks a judicially active determination neutralizing the purpose and intent of the RPA. Such would be contrary to the division of labor between Congress and the Court.[9] The purpose of the RPA, as determined from legislative history, has been described as follows:

> Now there are some people that think that in order to have competition, you need a few competitors. Not only do a few people think this, but this is also the opinion of the people that wrote the [Robinson-Patman] Act in the first place. The Judiciary Committee report states: "Existing laws [referring to the Sherman and Clayton Acts] have been too restrictive in requiring a showing of injury to competitive conditions in the line of commerce involved; whereas the more immediately important concern is an injury to a competitor victimized by the discrimination. Only through such injury, in fact, can the larger general injury result and that is the key." . . . There has to be some protection for competitors if, in fact, you are going to have competition. Otherwise, there's nobody left to compete.

Jerry S. Cohen, *Let's Retain It*, 45 Antitrust Law J. 44, 48 (1976).

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[9] As noted by this Court in *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 569 n.27 (1990): "Unlike scholarly commentators, we have a duty to be faithful to congressional intent when interpreting statutes, and are not free to consider whether, or how, the statute should be rewritten."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 04-905

IN THE

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

Reeder-Simco GMC, Inc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE TRUCK MANUFACTURERS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE FARM EQUIPMENT MANUFACTURERS ASSOCIATION, THE ASSOCIATION OF EQUIPMENT MANUFACTURERS, AND THE BUSINESS AND INSTITUTIONAL FURNITURE MANUFACTURER'S ASSOCIATION INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 04-905

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE TRUCK MANUFACTURERS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE FARM EQUIPMENT MANUFACTURERS ASSOCIATION, THE ASSOCIATION OF EQUIPMENT MANUFACTURERS, AND THE BUSINESS AND INSTITUTIONAL FURNITURE MANUFACTURER'S ASSOCIATION INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Truck Manufacturers Association ("TMA"), the National Association of Manufacturers ("NAM"), the Farm Equipment Manufacturers Association ("FEMA"), the Association of Equipment Manufacturers ("AEM"), and the Business and Institutional Furniture Manufacturer's Association International ("BIFMA") respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief. Its letter of consent has been lodged with the Clerk of Courts. Respondent has declined to consent.

TMA is a not-for-profit corporation whose members include all of the major North American manufacturers of medium-duty and heavy-duty trucks (greater than 19,500 pounds gross vehicle weight rating). TMA's members include Ford Motor Company, Freightliner LLC, General Motors Corporation, International Truck and Engine Corporation, Isuzu Motors America, Inc., Mack Trucks, Inc., PACCAR Inc., and Petitioner, Volvo Trucks North America, Inc.

NAM is the United States' largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

FEMA is a not-for-profit corporation comprised of over 650 United States and Canadian companies that are engaged in the manufacture and sale of specialty farm equipment, as well as companies that supply those manufacturers. FEMA operates to enhance the specialty farm equipment manufacturing industry by, among other things, providing industry leadership and business opportunities to its members.

AEM is a nonprofit corporation. Its members include the major manufacturers of equipment used worldwide in the construction, agricultural, mining, forestry, and utility industries. AEM members produce a wide variety of equipment, from large earthmovers and agricultural equipment to smaller hand-held, portable and walk-behind machinery designed to handle a wide variety of specialized tasks. Its members also produce components used by these equipment manufacturers, such as engines, transmissions, hydraulic equipment, and electronic controls; as well as provide services to these dynamic industries.

BIFMA is a not-for-profit trade association of furniture manufacturers and suppliers. BIFMA has 260 members, 145 of which are office furniture manufacturers. BIFMA's mission is to serve the North American office, business and institutional furniture manufacturing industry by providing industry information, advocating for the industry's interests, and offering industry-wide trade development opportunities.

Amici seek leave to file an amicus brief because the Eighth Circuit's erroneous application of the Robinson-Patman Act threatens to constrain their members from providing discounts or competitive price allowances to independent resellers. These discounts are the principal means by which manufacturers in many markets (including those for medium-duty and heavy-duty trucks, farm equipment, construction equipment, office furniture, and numerous other products sold by *amici*'s members) compete for sales to retail customers and the means by which retail customers secure favorable pricing, *i.e.*, by playing off one manufacturer's reseller against another manufacturer's reseller. Neither the Act's text nor its purposes justify the Eighth Circuit's novel application of it in these circumstances, and its decision conflicts with the decisions of this Court, as well as the decisions of other courts of appeals. Moreover, the effect of the Eighth Circuit's misapplication of the Act will be to decrease interbrand competition and to increase prices to consumers in the markets in which *amici*'s members participate.

For these reasons, TMA, NAM, FEMA, AEM, and BIFMA respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The individual interests of *amici curiae* are stated in the motion accompanying this brief.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

Amici collectively are interested in this case because the Eighth Circuit's decision threatens to impede substantially their members' ability to engage in interbrand competition by offering price discounts to their resellers. The Eighth Circuit, in a decision that conflicts with decisions of other courts of appeals on important issues of Robinson-Patman Act ("RPA") interpretation, concluded that manufacturer discounts may violate the RPA even when given to resellers that are competing only against resellers of other brands.

In reaching that conclusion, the Eighth Circuit misapplied the Act in a manner that will hinder competition and raise prices to consumers in the truck market involved in this case, as well as in markets for many other types of products sold by *amici*'s members. As explained in the sections that follow, while manufacturers employ the type of discounts at issue to increase *inter*brand competition, those discounts do not lessen *intra*brand competition—and the lessening of such competition is a required element of a RPA claim based on a manufacturer's prices to its resellers.

1. The market for medium-duty and heavy-duty trucks. Unlike automobiles, medium-duty and heavy-duty trucks are rarely bought "off the lot." Most trucking company purchasers operate fleets (varying from only a few trucks to several thousand trucks). These fleets serve a variety of uses, including over-the-road cargo hauling, and vocational applications, such as construction or logging. By the late 1990s, large purchasers (more than 100 trucks per year) comprised about a third of the market; midsized buyers (who purchased ten to ninety-nine trucks a year) just under a quarter, and only the remainder was comprised of small purchasers (who purchased less than ten a year).[2]

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[2] Michael E. Porter and Örjan Sölvell, *Volvo Trucks (A): Penetrating the U.S. Market*, Harv. Bus. Sch. Pub. (Rev. March 31, 2004) (*available at* http://www.hbsp.harvard.edu/b02/en/common/item_detail.jhtml?id=702418).

Truck manufacturers aggressively market their products by, among other things, providing their dealers with additional discounts on multiple truck deals to win business away from other manufacturers. Because the manufacturers have comparable product offerings, often the main competitive battle is over price. The result of this competitive battle is that customers obtain lower prices.

Because of the diversity of jobs for which these trucks are used, manufacturers offer a myriad of options for, among other things, engines, transmissions, axles, and cab configuration. Buyers generally purchase trucks "made to order" from dealers who most often maintain close relationships with their customers.[3] Because competition among truck manufacturers is fierce, truck buyers typically approach dealers of multiple brands before making a purchase. The prospective purchasers provide their specifications to the dealers and select the dealer (and its manufacturer) that gives the best terms. The manufacturer then builds its truck "from the ground up."

Since there are numerous options and specifications, manufacturers set the price they will sell trucks to their dealers case by case. For each prospective purchase, the dealer works with the potential buyer and finds out as much information as possible about its needs and circumstances—learning the buyer's specifications, how many trucks it desires, what other brands the buyer is considering, and, when possible, the prices offered by the competitor. Is the buyer, for example, a Volvo owner who might be more inclined to stay with that brand? Is the buyer seriously considering other brands? How price sensitive is the buyer? Is the buyer a "conquest account," meaning a buyer who has historically purchased another brand?—if so, a manufacturer may be willing to grant a significantly increased discount.

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[3] *Id.*

The dealer passes this information on to the manufacturer, which then considers a host of factors to determine whether and how much of an additional discount off the dealer's standard discount the manufacturer will provide in the hope of gaining the business. Some of these factors are industry related, *e.g.*, what is the current demand for trucks? Some are manufacturer related, *e.g.*, how busy is the assembly plant? And some are specific to the particular customer, *e.g.*, how many trucks is the customer expected to buy both now and in the future? Does the customer currently use a competing manufacturer's trucks or does he use the manufacturer's trucks but is considering another brand? Considering all of these factors—some of which are more amenable to calculation than others—the manufacturer provides the dealer with an additional discount, variously referred to as a "competitive price allowance" or a "concession." The result of this process is that on multiple truck deals to which price assistance programs apply, "dealers never know how much to sell a truck for until they call factory officials to see how much extra concession they'll allow on the deal."[4]

As Volvo demonstrated at trial, this system does not disadvantage its dealers competing for a particular sale because Volvo has a policy of providing the same discount to dealers that are working with the same potential buyer. C.A. 1162. That policy is common in the industry. *See Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 323 (5th Cir. 1998) (competitive price assistance program managed "to ensure that all Ford dealers bidding the same customer received an equal [competitive price allowance]"). It allows manufacturers to ensure that all of their dealers are able to compete with other brands without favoring some of their dealers over others in making a sale. *See id.* (providing dealers on the same bid with the same discount ensured "that all

[4] Joseph Bohn, *Truck Dealers Assail Floating-Discount Price System,* Automotive News, April 22, 1991, at 22.

Ford dealers could meet the competition from other original equipment manufacturers").

Thus, a manufacturer's price discount policy has no effect on whether a purchaser decides to buy from any particular dealer of that brand. Instead, the discounts serve only to *reduce* prices of one brand in competition with other brands. They promote *inter*brand price competition—the very type of competition that the antitrust laws principally protect. *See Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

2. Manufacturers in other markets also use differential prices to noncompeting resellers to foster interbrand competition. Similar procompetitive differential pricing occurs in many of the other markets in which *amici*'s members participate. Office furniture manufacturers, for example, market their products in a manner very similar to truck manufacturers, using independent resellers that sell to customers through a competitive bidding process that yields unique sales contracts. Agricultural and construction equipment manufacturers also generally market their products through a network of authorized dealers. These dealers in turn sell to construction companies, equipment rental firms, agricultural companies, government agencies, mining companies, and other end users. Interbrand competition among manufacturers of similar equipment types is intense. As in the truck market, equipment buyers typically approach dealers of several brands to negotiate the best bid for a unit or for an entire fleet that meets the end user's specifications. Given the general competitive environment or internal factors, such as a manufacturer's marketing objectives, a manufacturer may decide to offer additional price assistance to its dealer (*e.g.*, a greater discount or favorable financing) in order to obtain that buyer's business.

In fact, countless times every day members of the *amici* and other United States manufacturers grant additional discounts to independent resellers in order to secure a customer's order in the face of fierce interbrand competition. Through the use of such discounts—one weapon in the rough and tumble competitive battle—customer brand allegiance is switched and new products and product systems are purchased. The ultimate winner in this battle is the customer, who, having played one manufacturer off against another, is able to secure a lower price.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision, in addition to construing the RPA in a manner that conflicts with decisions of this Court and of other courts of appeals, fails to recognize the economic realities of the world in which manufacturing companies compete. The type of price competition that the Eighth Circuit held illegal, *i.e.*, discounts given to independent resellers to obtain a specific consumer's order, are prevalent in numerous industries, are procompetitive, and are consistent with decades of RPA jurisprudence. Indeed, this Court and other courts of appeals have recognized that the RPA does not forbid a manufacturer from offering its resellers differential prices if those resellers are not in actual competition for the same customers.

The Eighth Circuit ignored this basic principle. It instead allowed Respondent to recover based on allegations that Petitioner gave other resellers lower prices in connection with sales that Respondent could not have made because it was not competing for those sales. If the Eighth Circuit's decision stands, a manufacturer that offers a lower price to one of its resellers risks an RPA violation unless it offers the same price to all its resellers—even those that do not compete with that reseller or that could not have sold to that customer. Because of this risk, most manufacturers will need to reexamine their existing pricing programs and many will have to change those programs—an undertaking that will certainly impose substantial and unnecessary transaction costs and that will likely yield higher prices. The conflict created by the Eighth Circuit's opinion thus presents an issue of national importance that warrants this Court's proper resolution.

ARGUMENT

I. THE EIGHTH CIRCUIT'S ROBINSON-PATMAN ACT INTERPRETATION IS OF SUBSTANTIAL IMPORTANCE BECAUSE IT THREATENS TO IMPAIR PRICE COMPETITION WHEN MANUFACTURERS SELL THROUGH INDEPENDENT RESELLERS.

The Eighth Circuit's reliance on Volvo's discounts to dealers that were not attempting to sell to the same potential buyers as Respondent will likely result in less vigorous interbrand competition and higher prices—both in markets where goods are sold to individual customers through competitive bidding and in other markets in which resellers of the same brand do not compete for the same customers.

Under the Eighth Circuit's reasoning, a manufacturer setting the price on any one deal may not safely limit its price concession to the competitive circumstances of that sale. Instead, the manufacturer must consider the discounts it made up to months earlier on sales through other dealers to other customers anywhere in the United States (the breadth of the RPA). For example, if a manufacturer elected for competitive reasons to give a discount in connection with a particular bid situation in North Dakota, the Eighth Circuit's decision would arguably require that the manufacturer give that same discount on all similar trucks sold anywhere in the United States, even if the manufacturer extended the lower price in North Dakota to fill its order board, capture a high profile fleet, win business away from the manufacturer's competitor, or protect existing business from being won away by a low-balling competitor.

Under the decision, a manufacturer's only safe course of action to avoid RPA claims like those made by Respondent would be to level all discounts with a higher price. When it might otherwise be willing to discount heavily in one instance to try to win business from a rival or keep a factory at profitable usage, a manufacturer must now consider whether it can afford to offer that same discount to dealers elsewhere in the country for several months in the future. Unless a manufacturer is prepared to give the same discount to all its dealers, it likely will not give the discount at all.

The United States Department of Justice, in the analogous circumstance of most-favored-nations clauses, has concluded that this type of situation is *anti*-competitive.[5] It has reasoned that when a seller is forced to make a lower price available to other customers, price-cutting will be discouraged. So too under the Eighth Circuit's decision: manufacturers will be less willing to offer an aggressive discount on a particular deal if they are forced to provide that discount on all future deals, regardless of differing competitive circumstances.

These detrimental effects, moreover, are likely to be far reaching. Counseling—rather than prosecution—is the primary driver of RPA enforcement: "[T]ens of thousands, probably hundreds of thousands, of pricing decisions every

[5] *See, e.g., United States v. Med. Mut.*, 1999-1 Trade Cas. (CCH) ¶ 72,465 (N.D. Ohio Jan. 29, 1999) (consent decree barring enforcement of most-favored-nation requirement); *United States v. Delta Dental*, 1997-2 Trade Cas. (CCH) ¶ 71,860 (D.R.I. July 2, 1997) (consent decree prohibiting enforcement of most-favored-nation clause); *United States v. Ore. Dental Serv.*, 1995-2 Trade Cas. (CCH) ¶ 71,062 (N.D. Cal. July 14, 1995) (consent decree challenging most-favored-nation clause that discouraged discounts); *United States v. Lykes Bros. S.S. Co.*, 60 Fed. Reg. 52,208 (DOJ Oct. 5, 1995) (consent decree barring enforcement of "automatic rate differential clause"). *See also* Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 Antitrust L.J. 517, 529-30 (1996).

year are altered through fear of Robinson-Patman." Robert H. Bork, THE ANTITRUST PARADOX, 384 (1978). Thus, although the Eighth Circuit's extension of the RPA's prohibition on discounts cannot be reconciled with the Act's text or purpose and is inconsistent with the decisions of other courts (as explained *infra*), manufacturers may opt to adhere to it for national pricing strategies, rather than risk costly litigation. Indeed, the Act's treble damage and attorneys' fees provisions are substantial deterrents to testing in litigation the reach of the Eighth Circuit's decision. The potential competitive advantage obtained by giving increased discounts on particular bids will likely not warrant exposure to multimillion-dollar judgments like the one affirmed below. As a result, this Court may not be presented with another opportunity to correct the Eighth Circuit's error until long after manufacturers' efforts to comply with the decision substantially and needlessly diminish competitive market processes and increase prices to consumers.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS INTERPRETING THE ROBINSON-PATMAN ACT'S COMPETITIVE INJURY REQUIREMENT.

Section 2(a) of the RPA, 15 U.S.C. § 13(a), does not require a manufacturer to offer identical prices for its products to each dealer on every occasion. *See Am. Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963). Section 2(a) prohibits a manufacturer from charging different prices to its dealers only when the effect of the price differences "may be *substantially to lessen competition* . . . or prevent competition *with any person who either grants or knowingly receives the benefit of such discrimination*, or with customers of either of them." 15 U.S.C. § 13(a) (emphasis added). Thus, a § 2(a) claim requires a substantial lessening of competition at either the level of the person granting the discriminatory price (*i.e.*, the "primary line") or at the level of the person receiving the discriminatory price (*i.e.*, the "secondary line").

The RPA's prohibition on secondary line price discrimination was intended to remedy the perceived injustice that large chain retail stores would use their buying power to extract favorable discounts from manufacturers and would then lower their prices in order to drive their smaller rivals out of business by either stealing customers outright or by forcing the small stores to make unprofitable reductions in their own prices. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 49 (1948).

In a secondary line claim, like the one at issue, the relevant competition is competition *among that manufacturer's resellers.* A secondary line § 2(a) violation requires that the disfavored reseller compete with the favored reseller for the same retail customers and lose business or profits because of the price discrimination. *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir. 1982) (§ 2(a) requires proof that "the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from him, the disfavored competitor"). Thus, the plaintiff must prove that it competed with the favored purchaser at the time of the purchases. *See, e.g., Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1170-71 (7th Cir. 1978) ("Plaintiff must show that he competes with those customers receiving the favored prices.").

This requirement—that the disfavored reseller loses sales or profits to favored resellers—was effectively eliminated by the Eighth Circuit's conclusion that Petitioner's sales to dealers not competing against Respondent for the same customers violated the Act. By permitting Respondent to recover merely by showing that another dealer received a better price at some other time, in some other place, and in connection with sales to some other customer, the court of appeals has rewritten the RPA to prohibit manufacturers from lowering their price to compete against other brands, unless they give all resellers—even resellers that do not compete for the same customers—the same price.

A. Section 2(a) Requires Proof that the Price Differential Impedes the Disfavored Reseller's Ability to Sell to the Same Customers as the Favored Reseller.

A disfavored reseller can prove a "competitive injury" either directly or indirectly. *See Morton Salt,* 334 U.S. at 49. In either event, however, the injury itself must be of a type to which the RPA applies—*i.e.*, in a secondary line case, it must be lost sales or profits *caused by* the manufacturer charging different prices to competing resellers. *See Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983); *see also Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 421 (8th Cir. 1986) (no nexus demonstrated between the discriminatory price and plaintiff's injury when plaintiff presented no evidence that it "actually lost sales to [a] competing Texaco station" or that it "lowered its prices and decreased its profits in order to compete with any lower price by a Texaco dealer"); *Ag-Chem. Equip. Co. v. Hahn, Inc.*, 480 F.2d 482, 491 (8th Cir. 1973) (§ 2(a) verdict could not stand where "favored" dealer sold to "customers which were completely unavailable to plaintiff").

The direct method of proving competitive injury requires either (i) evidence that customers chose to buy from the favored reseller because its prices were lower as a result of the discriminatory discount, or (ii) proof that in order to avoid losing sales to the favored reseller, the disfavored reseller lowered its prices to meet the favored reseller's price and thereby lost profits. *See J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990); *see also Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 385-86 (8th Cir. 1987).

The indirect method of proving competitive injury requires evidence that for a significant amount of time the manufacturer sold goods to the disfavored reseller for substantially more than it sold the same goods to other resellers that were in direct competition for the same sales. *See Mor-*

ton Salt, 334 U.S. at 50. This indirect method thus proves the same competitive harm as the direct method: the disfavored reseller lost sales or profits because the discriminatory discount enabled a favored reseller to "steal" customers or forced the disfavored reseller to lower prices unprofitably to meet the favored reseller's prices. It is because the indirect method is intended to prove losses caused by the price discrimination that this Court has instructed, "[i]n the absence of direct evidence of displaced sales, this inference [of competitive injury] may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City Indus.*, 460 U.S. at 435.

B. The Eighth Circuit's Conclusion that Respondent Can Prevail in the Absence of Evidence that it Lost Sales to Competing Volvo Dealers Conflicts with Decisions of Other Courts of Appeals.

Because a § 2(a) secondary line claim only arises when a manufacturer's price differences disadvantage one reseller in competing for customers with other resellers of that brand, other courts of appeals have held that the RPA does not apply in circumstances, like those here, in which a disfavored purchaser did not try to compete for the same sales as the favored purchaser. For example, in *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), the Fifth Circuit reversed a jury verdict that M.C. Manufacturing's supplier violated the RPA by giving one of M.C. Manufacturing's competitors, H/R, a better deal on a component part for military hardware. The Fifth Circuit held that M.C. Manufacturing's RPA claim failed as matter of law because M.C. Manufacturing and H/R could not have been in competition—M.C. Manufacturing and H/R had both obtained an exclusive contract to sell the finished product to the government during different years. Since M.C. Manufacturing was selling under a preexisting fixed-price contract, discrimination in price by its supplier could not have created the lessening of competition essential to a RPA claim: "while the price discrepancy between the two actual purchases . . . could have affected [M.C. Manufacturing's] profits under the addition to its 1970 contract, this discrimination in no way diminished [its] competitive ability in that plug market." *Id.* at 1067. *See also Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 692 (5th Cir. 2003), *cert. denied,* 124 S. Ct. 2881 (2004) ("plaintiff must first prove that as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential" (internal quotation marks omitted)).[6]

Similarly, in *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, the Second Circuit reversed a jury verdict on a secondary line RPA claim where, like here, the plaintiff failed to show actual competition with the favored purchasers. 842 F.2d 578, 585-86 (2d Cir. 1987). In *Best Brands*, the Second Circuit held that the plaintiff, a brewery wholesaler with an exclusive territory, failed to demonstrate any competitive injury caused by the greater discounts its supplier gave competing wholesalers. Although the plaintiff suggested that the other wholesalers could ship into its territory, it did not present evidence that the favored wholesalers *in fact* took advantage of a price difference to make sales that the plaintiff otherwise could have made. *Id.* at 586.

Based on these authorities and the RPA's text and purposes, commentators have generally presumed that "competitive bidding is not subject to the price discrimination proscriptions of the Robinson-Patman Act, since it generally does not result in competitive injury." Neal R. Stoll, *The Paradox of Value: Price Discrimination Under Section 2(a) of the Robinson-Patman Act*, 740 PLI/Corp 169, at 206

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[6] *See also Olympia Co. v. Celotex Corp.*, 597 F. Supp. 285, 297 (E.D. La. 1984) (previous competition irrelevant if purchasers were not competitors at the time of the purchases), *aff'd on other grounds*, 771 F.2d 888 (5th Cir. 1985).

(1991).[7] The Eighth Circuit's decision casts that presumption—and the millions of daily pricing decisions that are made based on it—into substantial doubt.

C. The Eighth Circuit's Decision Creates Substantial Uncertainty Regarding the Robinson-Patman Act's Application When Manufacturers Provide Discounts to Noncompeting Resellers.

By holding that Petitioner's price discounts relating to sales that the Respondent *could not have made, and indeed, did not ever try to make,* caused harm to competition, the Eighth Circuit's decision erroneously extends the RPA to situations in which only one of a particular manufacturer's resellers is competing for a particular sale. As explained above, the decision thus conflicts with decisions of other federal courts, including the Fifth and Second Circuits. Because this conflict creates substantial uncertainty regarding whether manufacturers may give differential discounts to noncompeting resellers and harms interbrand competition, this Court should grant certiorari and reverse.

1. Reeder's § 2(a) claim is not supported by direct evidence: Greater discounts to other dealers in other transactions cannot show competitive harm.

The evidence on which the Eighth Circuit principally relied cannot support Reeder's contention that Volvo's differ-

[7] Competitive bidding is also not properly within the purview of § 2(a) because, as Petitioner explains (*see* Pet. at 12-15), such bidding does not meet § 2(a)'s two-sale requirement. *See also Cool Insulations, Inc. v. Owens-Corning Fiberglass Corp.*, 1999-1 Trade Cas. (CCH) ¶ 72,486 (W.D. Tex. 1998) (adopting *M.C. Mfg. Co.* view that competitive bidders are not "competing purchasers"); *Hancock Paper Co. v. Champion Int'l Corp.*, 424 F. Supp. 285, 287-89 (E.D. Pa. 1976) (competitive bids are outside §2(a)), *aff'd*, 565 F.2d 151 (3d Cir. 1977) (unpublished table decision).

ent discounts lessened competition—*i.e.*, impaired Reeder's ability to sell trucks against other Volvo dealers. Indeed, Reeder's sole witness testified that it rarely competed with other Volvo dealers (C.A. 1489-90); its competition admittedly came from other truck manufacturers' dealers (*id.* at 1489).

Sales lost to other manufacturer's dealers are not evidence of competitive harm. The Eighth Circuit's decision affirms the § 2(a) award principally based on Reeder's contention that but for the alleged violation, Volvo would have charged it less for trucks, and Reeder would have then successfully sold to more customers (at the expense of dealers of competing truck manufacturers) and would have had bigger profit margins on those sales. *See* App. 15a-17a. But the "violation-free" state of affairs is not one in which all dealers get the challenged discounts. *See Rose Confections*, 816 F.2d at 394-95. As discussed above, manufacturers put to the choice of lowering all prices or none will likely choose to forgo discounting. More fundamentally, the lost business on which Reeder relied results from *inter*brand competition—it has nothing to do with harm to competition under § 2 (a). *See Universal-Rundle Corp. v. FTC*, 382 F.2d 285, 287 (7th Cir. 1967); *Nat'l Distillers & Chem. Corp. v. Brad's Mach. Prods., Inc.*, 666 F.2d 492, 496 (11th Cir. 1982). In particular, Reeder's decreased profits from sales lost to other manufacturers' products cannot, as a matter of law, establish injury to competition. That Volvo gave other dealers larger discounts on other deals that Reeder was either unaware or uninterested in pursuing cannot prove competitive injury. *Cf. M.C. Mfg. Co.*, 517 F.2d at 1067 (error not to grant defendant directed verdict on § 2(a) claim when evidence showed that plaintiff's purchasers were for a different contract than other dealers because "[e]ach contract represented a separate, distinct market"). Any discounts on those deals did not affect Reeder's sales or profits.

The one sale Reeder lost to another Volvo dealer is legally insufficient to show competitive harm and cannot

support the entire § 2(a) award. Reeder's only evidence that it competed for a sale with a dealer that Volvo, according to the Eighth Circuit, gave a better discount is the Hiland Dairy sale. *See* App. 4a, 16a. This one sale alone—one sale out of over 5,000 claimed attempted sales by Reeder (C.A. 1159-61)—is a legally insufficient basis from which to infer competitive harm. *See Int'l Film Ctr., Inc. v. Graflex, Inc.*, 427 F.2d 334, 336 (3d Cir. 1970) (mere price differential in single isolated transaction did not constitute a RPA violation); *Am. Oil*, 325 F.2d at 106 (§ 2(a) claim requires "something more than an essentially temporary minimal impact on competition"). At all events, a § 2(a) claim based on this one sale (for which Reeder claimed lost profits of $30,000) cannot support the damages awarded (over $1.3 million before trebling). *See Rose Confections*, 816 F.2d at 395.

2. Under a proper application of the Robinson-Patman Act, the transactions at issue suggest no basis from which one could infer an injury to competition.

The Eighth Circuit's decision also does not identify indirect proof of competitive injury, *i.e.*, evidence from which the jury could *infer* competitive injury. There is no suggestion that Volvo, for a substantial period, gave better prices to other Volvo dealers that competed head-to-head with Reeder for customers. And Reeder's potential customers did not simply make covert purchases from other Volvo dealers. Trucks, unlike, *e.g.*, table salt, are not purchased casually from a corner store. Truck purchasers choose specific dealers with whom to select truck components. Only after components are chosen and the dealer contacts the manufacturer for a price concession, does the dealer propose a price. Thus, it would be incredible to suppose—and the decision identifies no supporting evidence—that any truck purchaser chose a dealer other than Reeder because it knew that the other Volvo dealer would have better prices.

In fact, as the Eighth Circuit acknowledged, the differences in price concessions (on different deals) were "small." App. 17a. Given the variety of factors that cause a manufacturer to set the price up or down on any transaction, that small differences in discounts between dealers that did not sell head to head could have no effect on competition. *See Rose Confections*, 816 F.2d at 385 (showing that "favored competitor received a *substantial* price reduction over a substantial period of time, . . . gives rise to a permissible inference of competitive injury" (emphasis added)). *Cf. Metro Ford*, 145 F.3d at 326 (RPA not violated where plaintiff truck dealer "was treated the same as all other Ford dealers with respect to [the price allowances] *for the same customer*" (emphasis added)).

3. In concluding that there was competitive injury, the Eighth Circuit erroneously relied on Petitioner's intent to use fewer dealers.

The Eighth Circuit's reliance on Volvo's supposed intent to reduce its dealer numbers as a basis for inferring a lessening of competition is also misplaced. Even accepting the evidence stretched to its limit in Reeder's favor, the most that can be inferred from Volvo's alleged intent to eliminate Reeder as its dealer is that Volvo could have given Reeder larger day-to-day discounts, but did not. As other courts of appeals have emphasized, a § 2(a) claim "must always focus on injury to *competition*." *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 395 (10th Cir. 1985).

Although a plan to eliminate Reeder as a dealer or not provide it with the best possible prices could have harmed Reeder, it could not have caused the necessary harm to intrabrand competition. *Id.* ("[n]either section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition" (emphasis in original)). By its own admission, Reeder competed only rarely with other Volvo dealers.

When one manufacturer's reseller does not compete with its others, the manufacturer's pricing decisions should not be inefficiently influenced by the possibility that the manufacturer has decided for its own business reasons not to provide the particular reseller with the best possible discounts. As in other antitrust areas, application of RPA principles should not be made to depend on inferences about a manufacturer's "intent" or "motive" in undertaking a particular marketing method. *Cf. NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 138 (1998) (defendant's motive irrelevant to application of the per se rule). Where there is no demonstrated harm to competition, the RPA does not apply.

* * *

The RPA has long been criticized. As Assistant Attorney General R. Hewitt Pate, head of the Department of Justice's Antitrust Division, recently wrote, "Virtually every antitrust commentator who has examined this Act has concluded that it is inconsistent with effective competition policy and is anti-consumer." Letter from R. Hewitt Pate, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., to Deborah A. Garza, Chair, Antitrust Modernization Commission (Jan. 5, 2005), *at* http://www.usdoj.gov/atr/public/20707122.htm. *See also* Bork, *supra*, at 385 ("The fact is that no other antitrust statute has been subject to so steady a barrage of hostile commentary as the Robinson-Patman Act."). While it is beyond dispute that "anticompetitiveness and business inefficiency are built into [the RPA]," *id.*, the Eighth Circuit's decision, which one commentator has accurately described "as a tortuous journey through § 2(a)," William C. Holmes, ANTITRUST LAW HANDBOOK § 1:6 (Nov. 2004), threatens to increase substantially the anticompetitiveness and business inefficiencies in many markets, including those in which *amici* participate. Because these anticompetitive effects and inefficiencies result from the Eighth Circuit's interpretive error rather than from congressional intent, correction should come from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF PUPIL TRANSPORTATION SERVICES IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF PUPIL TRANSPORTATION SERVICES IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of the Supreme Court of the Unites States, the National Association of State Directors of Pupil Transportation Services (the "Association") respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of Petitioner. Petitioner has consented to the filing of this brief, and Petitioner's letter of consent has been lodged with the Clerk of the Court. Respondent declined to consent.

The Association is a nonprofit organization that represents the interests of a diverse cross section of individuals and organizations involved in the transportation of the Nation's school children. The Association's members include state and local directors with the primary responsibility for school transportation. Specifically, the Association's members are responsible for purchasing the school buses that transport children to school and to school-related activities.

The Association seeks leave to file a brief as *Amicus Curiae* because the Association believes the attached brief may bring to the Court's attention a relevant matter not brought to its attention by the parties. The Association's members include consumers directly affected by the Circuit Court's decision; the effect of the Circuit Court's decision on consumers merits consideration.

The Circuit Court's decision will impair the ability of its members to purchase school buses. State and local governments purchase school buses through a competitive-bidding process, in which manufacturers and distributors offer selective discounts and "concessions" much like the concessions at issue in this case. The Circuit Court's decision will discourage school-bus manufacturers and distributors from offering such concessions. Fewer concessions and fewer discounts will mean higher prices for the state and local governments that buy school buses. Higher prices will likely mean fewer new buses purchased.

The Association respectfully requests that the Court grant it leave to file the attached brief as *Amicus Curiae* to share that viewpoint about the case at bar.

Respectfully submitted,

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February 3, 2005

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BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF PUPIL TRANSPORTATION SERVICES IN SUPPORT OF PETITIONER

Interest of the *Amicus Curiae*

Amicus Curiae,[1] the National Association of State Directors of Pupil Transportation Services, represents the

[1] Pursuant to Rule 37.6, counsel for *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part and no person other than *Amicus Curiae*, its members, members of its affiliated councils and its counsel made a monetary contribution to the brief's preparation or submission.

interests of a diverse cross section of individuals and organizations involved in the transportation of the Nation's school children. The Association's members include state and local directors with the primary responsibility for school transportation.[2] The Association is a nonprofit organization headquartered in Virginia.

The Association's members are responsible for transporting the Nation's school children on school buses. State and local governments spend more than $8.4 billion per year on school transportation.[3] Those governments buy school buses through a competitive-bidding process. "Concessions" offered by school-bus manufacturers to their local distributors play an important part in that process. In a "concession" program, school-bus manufacturers selectively discount the wholesale cost of buses offered by distributors to fulfill such competitive bids. The Circuit Court's decision will discourage such discounting and impair the ability of school-bus buyers to receive lower prices, resulting in fewer new buses purchased.

Summary of the Argument

The Circuit Court's decision will discourage school-bus manufacturers and distributors from offering "concessions" and selective discounts to local and state governments, the primary purchasers of school buses.

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2 School-bus manufacturers, equipment suppliers, and a number of state associations whose members include school transportation officials, drivers, trainers and mechanics are also members of affiliated councils within the Association.

3 *School Transportation News*, 2004 State and Provincial Directors of Pupil Transportation Survey.

Fewer discounts and concessions will seriously impair the ability of local and state governments to purchase new school buses. The effect of the Circuit Court's decision on school transportation militates in favor of review.

Argument

The Circuit Court's Decision Will Impair The Ability Of State And Local Governments To Buy Their School Buses At Lower Prices

The Nation's school transportation system relies largely on school buses. On the average day, more than 25 million school children ride public school buses to and from school. They ride in a fleet of some 450,000 school buses that travel a cumulative total of more than 313 billion passenger-miles per year.[4] That adds up to some 10 billion student trips per year on school buses.

Federal, state and local governments have naturally invested substantial efforts in assuring the safety and efficiency of that school-bus fleet. Most notably, the Department of Transportation's regulations

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4 NAT'L ACADEMY OF SCIENCE, TRANSP. RESEARCH BD. OF THE NAT'L ACADEMIES, Special Report 269, *The Relative Risks of School Travel: A National Perspective and Guidance for Local Community Risk Assessment*, 4 (2002).

detail extensive requirements for school-bus safety.[5] State governments also typically publish further highly detailed specifications for school buses, often extending more than a hundred pages.

The safety of its school-bus fleet has been one of the Nation's success stories. School-bus transportation is the safest form of school transportation in the United States.[6] An important part of that safety record has come from school districts' systematically retiring older buses and acquiring newer buses that comply with updated specifications and safety standards.

Three major manufacturers make most of the Nation's school-bus fleet. Laws in most states require the manufacturers to sell those buses through local distributors. A school-bus manufacturer typically will

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[5] The Federal Motor Vehicle Safety Standards adopted by the National Highway Traffic Safety Administration appear at 49 C.F.R. § 571. A number of sections in that regulation address special issues relating to school buses, including school bus pedestrian safety devices (49 C.F.R. § 571.131), school bus rollover protection (49 C.F.R. § 571.220), school bus body joint strength (49 C.F.R. § 571.221) and school bus passenger seating and crash protection (49 C.F.R. § 571.222). Most of the 611 pages of the motor vehicle safety standards and testing procedures also apply to school buses.

[6] For the school years 1991-1999, school buses represented 25 percent of the miles traveled by students during normal school travel hours but accounted for less than 4 percent of injuries and only 2 percent of fatalities. NAT'L ACADEMY OF SCIENCE, TRANSP. RESEARCH BD. OF THE NAT'L ACADEMIES, Special Report 269, *The Relative Risks of School Travel: A National Perspective and Guidance for Local Community Risk Assessment*, 5 (2002).

appoint a distributor to cover a specific state or several states as the distributor's area of primary responsibility. School-bus distributors do, however, sell outside their territories from time to time.

The buyers of school buses purchase their fleets with tax revenues. They buy the overwhelming majority of school buses through competitive bidding.

In the competitive-bidding scheme, a very large percentage of school buses is sold on a "concession" basis. In such a transaction, the school-bus manufacturer determines that it will grant the distributor a concession off the wholesale price to allow the distributor to compete more effectively for a specific bid.

Such concessions allow school-bus buyers to receive the benefit of selective discounts. Where a manufacturer believes that it must lower its price to enable its Distributor A to "get the business" in a particular bid, the manufacturer grants a concession that might not be available to other distributors, such as Distributor B from another state that is not seeking that bid. (Of course, Distributor B will likely get its own selective concessions for other bids – including bids that Distributor A will not be competing for.)

The Circuit Court's ruling in this case discourages such discounting. Under the rule in that opinion, the manufacturer who offers the concession to Distributor A may have to pay damages to Distributor B, even though Distributor B had no interest in the transaction and did

not bid.[7] Where school-bus manufacturers are discouraged from discounting, school-bus buyers suffer.

The Association's perception of the likely effect of the Circuit Court's opinion on school-bus purchasing comports with the teaching of antitrust economics. If the cost of providing a selective discount is treble damages and attorneys' fees, the manufacturer will most likely forego the selective discount. 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 269, ¶ 721e (2d ed. 2002) (manufacturer forbidden to discount will "[m]ore ~~likely~~ ~~forego~~ sales, causing some customers "to pay higher prices").

The tax revenues for school-bus purchases are limited. Faced with higher prices, some school-bus purchasers each year will inevitably have to buy fewer new buses to replace older ones.[8]

The Association respectfully suggests to the Court that this is not just a commercial issue between manufacturers and dealers. However commendable – or

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[7] The Circuit Court held that once the truck dealer showed that it had actually bought some trucks from the manufacturer, the dealer could include in its damage base transactions in another state that it did not even bid on. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 705-706, 714 (8th Cir. 2004).

[8] If school buses become more expensive and school-bus purchasers buy fewer new buses to replace older buses, new protection features in new school buses cannot be afforded to all riders. Additionally, higher bus prices will keep older, less efficient and less environmentally friendly buses in use longer.

debatable – the policy may be of protecting middlemen under the Robinson-Patman Act, that policy has an effect on consumers, whose interests are often overlooked. Here, the Circuit Court's unprecedented extension of the Robinson-Patman Act will affect an important class of consumers. We respectfully urge that the effect of the Circuit Court's opinion on an important part of our Nation's school-transportation system militates strongly for review.

Conclusion

The Petition for a Writ of Certiorari should be granted.

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the Petitioners. Petitioner has consented to the filing of this brief; its letter of consent has been lodged with the Clerk of the Court. Counsel for Respondent declined to give consent, thereby necessitating this motion.

WLF is a public interest law and policy center based in Washington, D.C., with supporters nationwide. While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this and other federal courts to address the proper scope of the antitrust laws. *See, e.g., Texaco v. Dagher* (Nos. 04-805 and 04-814, petitions filed Dec. 14, 2004); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States Tobacco Co. v. Conwood Co., cert. denied*, 123 S. Ct. 876 (2003); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003).

WLF is concerned that the decision below would greatly expand the scope of unlawful price discrimination within the Eighth Circuit, and thereby create inordinate uncertainty among product manufacturers in national markets regarding the scope of proscribed conduct under the Robinson-Patman Act. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

Respectfully submitted,

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February 4, 2005

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] The interests of the *amicus* are set out in the motion for leave to file accompanying this brief.

ARGUMENT

I. This Court Should Address Whether A Transaction Involving No Purchase Satisfies The Act's "Purchaser" Requirement.

The Robinson-Patman Act by its terms would appear to indicate that only actual purchasers who have paid a discriminatory price are within the scope of the Act. The Act provides in pertinent part that it is "unlawful . . . to discriminate in price between different *purchasers* of commodities of like grade and quality." 15 U.S.C. § 13(a). The court below and the Fifth Circuit have reached opposing conclusions as to whether non-purchasers, such as the plaintiff here, can obtain money damages under the Act based on bids in which they were unsuccessful and thus led to no purchase.

The court below examined the practice in which Volvo and other truck manufacturers provide discounts on a case-by-case basis to dealers seeking to bid on truck contracts. The court determined that this "industry-standard practice,"[2] Pet. App. 2a, amounted to a violation of the Act where plaintiff alleged that Volvo had offered it a lesser discount (offered a higher wholesale price) than it offered to other dealers involved in

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

[2] *See also Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998) (rejecting similar Robinson-Patman Act challenge to Ford's wholesale truck discounting).

different bidding processes for different customers with different requirements. The court conceded that "an unsuccessful bidder is not a purchaser within the meaning of the [Act]." Pet. App. 9a. The court held, however, that losses from plaintiff's unsuccessful bids could nonetheless be a basis of liability and could be incorporated into the damages award. Pet. App. 17a-20a.

The dissenting judge argued that except in the four instances where plaintiff allegedly purchased trucks from Volvo at a discriminatory price, the transactions at issue – the losing bids – were outside the scope of the Act and were not properly included in a damages award. Pet. App. 28a.

In contrast to the approach of the panel majority in the court below, the Fifth Circuit has required an actual purchase as a condition for a claim under the Act, and held that a transaction involving a mere bid, absent a purchase, does not meet that requirement. *M. C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1067 (5th Cir. 1975).

The fact that plaintiff Reeder-Simco GMC was successful in *some* bids does not meaningfully distinguish this case from *M. C. Mfg. Co.* with regard to the larger number of bids at issue that led to no purchase by Reeder-Simco GMC. The truck pricing in the unsuccessful bids were, by definition, not violations of the Act, and thus plaintiff cannot meet its burden with respect to those bids. "Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969)

The Fifth Circuit in *M. C. Mfg. Co.* acknowledged that an earlier decision, *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951), "appears to create a special exception to the two-purchaser requirement where *competitors in the same market* are engaged

in competitive purchasing and selling at the time of the price discrimination and where the failure of the plaintiff to consummate a second purchase of the item discriminatorily priced is directly attributable to defendant's own discriminatory practice." 517 F.2d at 1067 n.17 (emphasis added). This exception to the requirement of an actual purchase has been characterized as "an aberration." Hugh C. Hansen, *Robinson-Patman Law: A Review And Analysis*, 51 Fordham L. Rev. 1113, 1218 n.79 (1983). Here, as further elaborated in the following part, plaintiff Reeder-Simco GMC is not in competition with the purchasers who allegedly received preferable discounts; thus, plaintiff is not within the exception recognized by the Fifth Circuit in any event.

It is true that the approach of the Fifth Circuit – and, *amicus* believes, the approach dictated by the statutory text – leaves some instances of price discrimination uncompensated in the context of competitive bidding. This is a reflection of the fact that the Act is deliberately limited in scope, generally geared toward maintaining fairness in conventional retail-wholesale pricing programs.[3] *Cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (Rule 10b-5 suits available only to actual purchasers and sellers of shares, not to those who are misled by defendant's fraud into not purchasing).

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[3] This is far from the only dimension in which the Act is limited in scope. For example, the Act does not cover transactions involving services, applying by its terms only to "commodities." *See* Mark Klock, *Unconscionability and Price Discrimination*, 69 Tenn. L. Rev. 317, 358-61 (2002).

II. This Court Should Address Whether Sales Lost To Unrelated Third Parties, Not Favored Purchasers, Are Cognizable Competitive Injuries Under The Act.

To establish a violation of the Act, plaintiff must establish that "the discrimination had a prohibited effect on competition." *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990). The competitive injury cognizable under the Act includes "injury to competition between the favored and the disfavored purchaser" – so-called "secondary-line" injury. *Texaco*, 496 U.S. at 571.

A number of courts of appeals have indicated that there is no competitive injury in secondary-line cases unless the favored buyer and disfavored buyer are in actual competition with respect to the same specific customer or customers. The Second Circuit articulated this requirement in *Best Brands Beverage v. Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987). "In order to establish the requisite competitive injury in a secondary-line case, plaintiff must first prove that, as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential." 842 F.2d at 584. The Fifth Circuit has stated that in Robinson-Patman Act cases, "competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." *Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 692 (5th Cir. 2003). *See also Stelwagon Mfg. Co. v. Tarmac Roofing Sys.*, 63 F.3d 1267, 1271 (3d Cir. 1995); *National Distillers & Chem. Corp. v. Brad's Mach. Prods.*, 666 F.2d 492, 496 (11th Cir. 1982).

Here, all but two of the instances of price discrimination alleged by Reeder-Simco GMC do not involve competition with another Volvo dealer.[4] The court of appeals, however, rejected a

[4] The two exceptions identified by the court of appeals – the two occasions when plaintiff was bidding against another Volvo dealer for the same deal – were the plaintiff's bid for the sale of twelve trucks to Hiland Dairy Company and its bid for a five-truck sale to Tommy Davidson. Pet. App. 4a, 11a-12a.

requirement of "direct head-to-head competition" between plaintiff and the dealers who allegedly received more favorable terms. Pet. App. 17a. It determined that sales lost to non-Volvo dealers were also cognizable injuries to competition. Yet the plaintiff in those bids was in competition only with dealers of other brands of trucks, and any lost sales and lost profits were lost to those non-Volvo dealers – not to Volvo dealers granted favorable treatment by Volvo.

This approach represents a significant expansion of the Act. In the context of competitive bidding, there will always be one or more disappointed bidders. Under the theory of the court below, a disappointed dealer-bidder will always have a cause of action under the Act if the manufacturer has previously offered a larger discount to another dealer in connection with a different bidding process (or if the manufacturer subsequently does so). The practical effect of such a doctrine is to eliminate competitive injury as a distinct requirement, and, ultimately, to forbid any variations in discounting. This Court should address whether "inter-brand" losses such as those involved here are cognizable under the Robinson-Patman Act.

CONCLUSION

For the foregoing reasons and for the reasons stated by petitioner, the Court should grant the petition for certiorari.

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In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

There ought to be a law. Or so respondent, Reeder, believes. If "a manufacturer of any product * * * establish[es] different pricing schemes for different dealers, similarly situated," there should be a statutory violation even if "Dealer A (the disfavored dealer) could not point to customers who actually shopped among those dealers – including both Dealer A and Dealer B – and chose to buy a given unit from Dealer B who received a lower price from the manufacturer." Br. in Opp. 27.

Whether or not there ought to be such a law, the Robinson-Patman Act is certainly not a statute that forbids such "discrimination." The Eighth Circuit's decision to the contrary cannot be reconciled with the text of the statute or prior interpretations of it by other courts of appeals. That decision extends the RPA to award treble damages to purchasers who claim that they could earn higher profits in *inter-brand* competition if only their supplier would charge them less. Such claims will be indisputably true in virtually every case, but are legally irrelevant. The RPA imposes limited restrictions on price discrimination that affects *intra-brand* competition; it does not broadly forbid price discrimination affecting inter-brand competition. The Eighth Circuit has extended the statute beyond its clearly expressed limits in a way that, if not corrected, will harm competition and injure consumers. Unless this Court acts, the Eighth Circuit's wildly erroneous decision (by a divided panel) will foster enormous amounts of litigation as plaintiffs who previously would have known not to bring suit because of well-settled rules precluding recovery now are encouraged to sue over any price difference, whether or not it resulted in two sales at different prices and whether or not the plaintiff lost sales to a favored purchaser.

1. Reeder confirms, albeit indirectly and grudgingly, that the Eighth Circuit's affirmance of the jury's liability determination rests entirely on incidents in which Reeder (a) lost sales to competitors who were selling different brands of trucks and who did not purchase from Volvo and (b) lost one sale to a compet-

ing Volvo dealer, but was not a "purchaser" from Volvo in connection with that competition.

Reeder makes repeated references to evidence of the "diversion" of sales to favored Volvo dealers. In Reeder's usage, though, "diversion" means nothing more than a general decline in its sales of Volvo trucks while sales volumes of some other Volvo dealers increased. "Diversion" in this sense is undisputed, unremarkable, and common – which is one reason why the decision below, if it stands, will foster enormous amounts of litigation – but is legally insufficient to support RPA liability.

The evidence is abundantly clear, however, that with only one exception – the sale to Hiland Dairy that is addressed separately below – when Reeder's sales efforts were unsuccessful, it was because customers chose to buy a different brand of trucks from a non-Volvo dealer. Those customers did *not* turn to another Volvo dealer that purchased from Volvo at a price lower than the price Volvo offered to Reeder. The supposedly "favored" Volvo dealers were not even bidding for sales to those customers. Competition between Reeder and another Volvo dealer was the rare exception, as Reeder's own evidence shows. In particular, the sales by Westfall Volvo that are highlighted by Reeder as examples of the "diversion" of sales to a favored dealer, Br. in Opp. 4, were sales for which Reeder did not compete and does not claim to have competed; the sales were "diverted" only in Reeder's idiosyncratic usage of that term. Likewise, the transactions in which Reeder succeeded in selling trucks to Lane Freight, City of Fort Smith, New Hi-Way, and Sam Ludington, but claimed to have lost profits because of Volvo's supposed "discrimination," Br. in Opp. 3, were transactions for which no other Volvo dealer submitted a bid; Reeder competed for those sales only with non-Volvo dealers. See Pet. App. 4a-6a (describing "sales-to-sales" comparisons).

That is why Reeder ultimately is forced to argue that the RPA is violated even if "Dealer A" (a disfavored purchaser) and "Dealer B" (a favored purchaser) do not compete to sell to the same customer. See Br. in Opp. 27 (disputing the proposition

that Reeder and favored Volvo dealers "must be bidding for the same customer on the same truck"). That argument is inconsistent with the plain language of the RPA, which forbids discrimination only if it impairs a disfavored purchaser's ability to *compete* against any person who "receives the benefit of such discrimination."[1]

Reeder claims that *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), supports liability in this situation. Br. in Opp. 15. It does not. *Morton Salt* indicated, in *dicta*, that the competitive injury required under the RPA need not be proved with direct evidence that a disfavored purchaser lost sales when its customers turned away from it to buy from a favored purchaser. Such injury could also be shown by inference, based on proof that manufacturers "sell their goods to some customers substantially cheaper than they sell like goods *to the competitors* of these customers." 334 U.S. at 50 (emphasis added). After *Morton Salt*, courts have sometimes proceeded on the assumption, which is reasonable in many contexts, that a favored purchaser is a "competitor" to a disfavored purchaser if both of them operate in the same geographic area and at the same "functional" level, *e.g.* if both are wholesalers or both are retailers. The Eighth Circuit did so here, citing *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987), as authority for that approach. Pet. App. 11a.

But the *Morton Salt* "inference" that Reeder points to says nothing about the nature of the competitive injury that the RPA requires; it addresses only the kind of evidence that is required

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[1] Reeder confusingly implies that its claim should be evaluated under an alternative competitive injury requirement set forth in the RPA, that the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." Br. in Opp. 13. But this alternative form of competitive injury is *more* demanding, not less. It requires proof not only that the *plaintiff's* ability to compete has been impaired, but also that this impairment of an individual competitor will harm competition in the market generally. See *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 49 (discussing distinction between the two kinds of competitive injury).

to prove the injury. In particular, nothing in *Morton Salt* suggests that sales lost to inter-brand competitors are a cognizable injury under the RPA. Rather, the opinion holds that a disfavored purchaser suffers the requisite injury if it is "handicapped *in competing with the more favored * * * purchasers* by the differential in price." *Morton Salt*, 334 U.S. at 50. And the Court's description of the kind of evidence required to support the inference of such injury – sales at lower prices "to the competitors" of disfavored purchasers – makes no sense if, as Reeder argues, the injury to be inferred encompasses lost sales in inter-brand competition. Such losses to inter-brand competitors are equally likely or unlikely, whether the favored purchaser competes against the disfavored purchaser or not. See Pet. 17.

Moreover, this Court has since made clear that any inference of injury that may be drawn from evidence of "substantial price discrimination between *competing* purchasers over time" may be "overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (emphasis added). If that causal connection exists in the first place (a dubious premise here), it is clearly broken when the evidence shows unambiguously, as it does in this case, that the favored and disfavored purchasers are not competing to sell to the same customers, even though they operate in the same geographic area and at the same functional level.[2] In that situation, the disfavored purchaser can lose sales or profits only to inter-brand competitors, an "injury" the RPA does not address.

[2] Reeder cites *In re Boise Cascade Corp.*, 107 F.T.C. 76 (1986), in support of its argument that it is sufficient to show that the favored and disfavored purchasers operate in the same geographic area and at the same functional level. Br. in Opp. 24. But Reeder fails to acknowledge the case's subsequent history. The FTC's decision was reversed – in a decision we cited in the petition (at 16 n.3) – because the FTC did not consider evidence that was offered to rebut the *Morton Salt* presumption. *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988). "Robinson-Patman has not ushered in a bizarre rule of law that exalts theory 'no matter what' in the face of hard, cold facts." *Id.* at 1146.

The requisite causal connection between the discrimination and the injury is broken here for a second reason. Under the RPA, the plaintiff's injury must be caused by the seller's *discrimination* in price, not by the absolute level of the price. When the plaintiff is competing only against inter-brand competitors, it will always lose sales or profits if the price that it pays to its supplier is higher rather than lower, but the price that its supplier charges to some other purchaser that is not competing against the plaintiff will have no effect on the plaintiff's sales or profits. As Judge Hansen's dissent recognized in this case, "the *difference* in concessions offered to Reeder and the 'favored' Volvo dealers did not cause the lost sales or profits" to non-Volvo dealers. Pet. App. 31a (emphasis in original).

The record is clear that Reeder lost sales to a non-Volvo dealer, and not to a favored Volvo dealer, in every transaction in which it claims to have lost a sale because of Volvo's pricing practices, save one. See Pet. 5-7; Pet. App. 29a-30a (Hansen, J., dissenting). These competitive losses to non-Volvo dealers do not constitute a cognizable injury under the plain language of the RPA or its consistent interpretation before this case.

2. The only sale that Reeder lost to another Volvo dealer, the sale to Hiland Dairy, cannot provide the basis for RPA liability for a different reason: Reeder did not purchase from Volvo in connection with that transaction. See Pet. App. 4a, 31a. The RPA requires proof that discrimination in price "between different purchasers" has caused competitive harm and, because of this requirement, other courts have recognized that a discriminatory offer to sell cannot lead to RPA liability if the offer is not followed by a purchase. See Pet. 12-15. Recognizing this, Reeder relies, as the Eighth Circuit did, on the proposition that its "status" as a purchaser in unrelated transactions is sufficient to satisfy this prerequisite for any RPA violation. Thus, Reeder points to its purchases from Volvo in four transactions that could not properly result in liability (because, as ex-

plained above, Reeder did not compete against another Volvo dealer in any of those transactions) and claims that its purchaser "status" obviates proof that there was discrimination "between different purchasers" in connection with the sale to Hiland Dairy, the only transaction in which the requisite competitive effect – diversion of sales or profits to another Volvo dealer – could possibly have occurred. Br. in Opp. 12.

Because Reeder did not produce evidence of any transaction in which discrimination between purchasers produced the requisite competitive effect, its claim should have been rejected as a matter of law. Other courts of appeals have correctly applied this principle to reject RPA claims when a seller offered different prices to two firms that were bidding against each other for a sale, but only one of those firms (the winning bidder) ultimately purchased from the defendant. See Pet. 12-15 (discussing *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604 (4th Cir. 1985), and *M.C. Mfg. Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), cert. denied , 424 U.S. 968 (1976)). The Eighth Circuit in this case did the opposite. Although it cited *Terry's Floor Fashions* and *M. C. Mfg.*, it did not follow them or distinguish them on the basis of any analysis that can survive even a cursory reading of the statutory language.

3. Reeder also confirms that, under its and the Eighth Circuit's interpretation, the RPA effectively imposes liability for every act of price discrimination unless the discriminating seller can prove that the price differences were cost justified or necessary to meet a competitor's price. See Br. in Opp. 23 ("The RPA prohibits price discrimination between two purchasers * * * as long as the sales to such purchasers are 'reasonably contemporaneous,' and the products sold are of 'like grade and quality.'"); *id.* at 28-29 ("Nothing in the RPA or the Eighth Circuit opinion prohibits a seller from offering its products at different prices to different buyers, so long as the reason for such difference is legitimate (e.g., 'cost justification' or 'meeting competition.'"). This is the logical implication of a

holding that losses of sales or profits in inter-brand competition may provide the basis for RPA liability. As Professor Hovenkamp explains, "[T]he mere payment of a higher price than someone else pays * * * would injure *any* purchaser of an input * * *." 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶2333b, at 89 (1999) (emphasis added). As he further explains, however, "[T]his is not the injury that the Robinson-Patman Act contemplates. The injury [contemplated by the RPA] is * * * the loss of ability *to compete effectively with the favored purchaser*." *Ibid.* (emphasis added).

It is no answer to suggest, as Reeder does, that treble-damage liability may be avoided if the seller can prove that price differences are justified by differences in the costs of selling to different purchasers or by a desire to match a competitor's price. This Court has observed that the cost justification defense is available to RPA defendants "[i]n theory," but

> interposing the defense has proven difficult, expensive, and often unsuccessful. Moreover, to establish the defense a seller must show that the price reductions given did not exceed the actual cost savings, and this requirement of exactitude is ill suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors.

Texaco Inc. v. *Hasbrouck*, 496 U.S. 543, 561 n.18 (1990) (internal quotations and citations omitted). The "meeting competition" defense is equally problematic. A seller that wants to rely on the defense must have enough information about the price offered by its competitor to support a good faith belief, but the antitrust agencies have noted that this defense to RPA liability may perversely encourage anticompetitive information sharing and tacit collusion. See *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80-81 (1979).

In any event, Reeder offers no reason to disregard the plain statutory language, which requires proof of effects on intra-brand competition in order to make out a *prima facie* case,

merely because the statute permits defendants to assert affirmative defenses *if the elements of a violation have otherwise been made out*. Because a disfavored purchaser could plausibly assert losses to inter-brand competition in virtually every case, Reeder's proposed construction of the RPA would allow plaintiffs to establish a *prima facie* case whenever sellers charge different prices to different customers, effectively repealing the statutory requirement that such differences must cause the proscribed effects on competition, and effectively shifting to defendants the burden of proving that price differences are justified under one of the affirmative defenses. A greater invitation to bring litigation is difficult to imagine.

4. Reeder's brief paints a vivid picture of the state of competition in the heavy-truck market during the period of the alleged price discrimination. "[C]ompetition in heavy truck sales has been high since 1996 and profit margins in the heavy truck business have been relatively low since 1996." Br. in Opp. 6. Volvo's plant was operating at full capacity but was falling behind in its efforts to fill customer orders, while the industry in 1998 and 1999 "was well on its way to achieving all-time record volume." *Ibid.* "[C]ompetition was keen and dealer profit margins were narrow." *Ibid.* This is a picture of intense competition, a success story for antitrust policy and consumers.

This vibrant competition exists partly because of, not in spite of, the common industry practice of selective discounts of the kind challenged by Reeder – a practice that developed because truck manufacturers understood the RPA to permit discounts to be offered selectively in the circumstances presented by this case. If the RPA is extended to impose treble-damage liability for such selective discounting, sellers will simply charge a uniform but higher price, to the detriment of consumers and competition. That is why such unusual *amici* as the National Association of State Directors of Pupil Transportation Services – a group of *buyers* of school buses representing consumer interests – have sought leave to appear before this Court in support of certiorari.

The Eighth Circuit's fundamental error, if not corrected, will have harmful effects in every industry that is subject to the RPA, which reaches discrimination in the sale of any "commodities" "in commerce," 15 U.S.C. § 13(a). Recognizing the broad reach of the decision below, the National Association of Manufacturers and an array of *amici* from various industries have sought leave to file a brief in this Court in support of certiorari. The deleterious effect of letting the blatant errors below stand cannot be confined to the Eighth Circuit, even if other courts of appeals correctly interpret the statute, because manufacturers that distribute their products nationally will be at risk of treble-damage lawsuits by "victims" who can sue in the Eighth Circuit under the liberal jurisdiction and venue provisions of the antitrust laws. See Pet. 29-30. This Court's intervention is needed to reinstate the limits on the scope of the RPA that are expressed in the statute's language, to resolve the conflicts between the decision below and the decisions of other circuits that have correctly applied settled law, to allow RPA counselors to advise their clients using well-understood principles rather than the Eighth Circuit's idiosyncratic view of the statute, and to fend off an avalanche of unproductive, anti-consumer litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Order of the United States District Court for the Western District of Arkansas, dated January 3, 2002 ..... 40a

Order of the United States District Court for the Western District of Arkansas, dated January 25, 2002 ..... 36a

Judgment of the United States District Court for the Western District of Arkansas, dated March 1, 2002 ..... 33a

Order of the United States District Court for the Western District of Arkansas, dated May 1, 2002 ..... 35a

Opinion of the United States Court of Appeals for the Eighth Circuit, dated July 12, 2004 ..... 1a

Order of the United States Court of Appeals for the Eighth Circuit denying petition for rehearing, entered October 6, 2004 ..... 43a

RELEVANT DOCKET ENTRIES

U.S. District Court for the Western District of Arkansas (Fort Smith), Case No. 00-CV-2031 (RTD):

DATE	#	DOCKET ENTRY
2/9/00	1	COMPLAINT w/ jury demand & attachments (1 Summons(es) issued & retd to atty f/svc) (rw) [Entry date 2/09/00]
10/4/01	54	FIRST AMENDED COMPLAINT [1-1] w/attachments by plaintiff Reeder-Simco GMC Inc; jury demand (rw) [Entry date 10/04/01]
12/7/01	56	MOTION by dft Volvo GM Truck Corp for summary judgment (EXHIBITS PLACED IN SEPARATE FOLDER) (ke) [Entry date 12/07/01]
12/7/01	57	MEMORANDUM BRIEF by dft Volvo GM Truck Corp in support of motion for summary judgment [56-1] (ke) [Entry date 12/07/01]
12/7/01	58	STATEMENT OF FACTS by dft Volvo GM Truck Corp in support of motion for summary judgment [56-1] (ke) [Entry date 12/07/01]
12/21/01	65	RESPONSE by pltf Reeder-Simco GMC Inc to motion for summary judgment (EXHIBITS PLACED IN SEPARATE FOLDER) [56-1] (ke) [Entry date 12/21/01]
12/21/01	66	MEMORANDUM BRIEF by pltf Reeder-Simco GMC Inc in support of motion response [65-1] (ke) [Entry date 12/21/01]
12/21/01	67	STATEMENT OF FACTS by pltf Reeder-Simco GMC Inc in support of motion response [65-1] (ke) [Entry date 12/21/01]

1/3/02	70	ORDER by Honorable Robert T. Dawson granting deft's motion for summary judgment in part & denying in part (EXHIBITS PLACED IN SEPARATE FOLDER) [56-1]; further pltf's claims for primary-line discrimination under the Robinson-Patman Act & for tortious interference w/a contractual relationship or business expectancies are dismissed w/prej; further all other claims are set for the jury trial on 1/14/02 (cc: all consel) (rw) [Entry date 01/03/02]
1/14/02	85	CLERK'S NOTES: , ; Jury trial began, day one (hhp) [Entry date 01/17/02]
1/15/02	86	CLERK'S NOTES: Day Two, Jury Trial Continues (hhp) [Entry date 1/17/02]
1/15/02	–	DEPOSITION of Hugh Samuel Johnston taken on the following date(s): 05/22/01 submitted w/trial transcript on 07/16/02 (mfr) [Entry date 07/17/02]
1/16/02	87	CLERK'S NOTES: Day Three, Jury Trial Continues (hhp) [Entry date 01/17/02]
1/17/02	88	CLERK'S NOTES: Day Four, Civil Trial continues (hhp) [Entry date 01/22/02]
1/17/02	–	DEPOSITION of Christopher William Patterson taken on the following date(s): 05/23/01 submitted to court w/trial transcript on 07/16/02 (mfr) [Entry date 07/17/02]
1/17/02	–	DEPOSITION of Robert David Wright taken on the following date(s): 05/24/01 submitted to court w/trial transcript on 07/16/02 (mfr) [Entry date 07/17/02]
1/18/02	89	CLERK'S NOTES: Day Five, Civil Jury Trial Continues (hhp) [Entry date 01/22/02]

1/18/02	–	DEPOSITION of Suzanne Keith Warren taken on the following date(s): 05/22/01 submitted to court w/trial transcript on 07/16/02 (mfr) [Entry date 07/17/02]
1/22/02	91	CLERK'S NOTES: Day Six, Civil Trial Continues (hhp) [Entry date 01/23/02]
1/23/02	92	CLERK'S NOTES: Day Seven, Civil Trial Continues (hhp) [Entry date 01/24/02]
1/24/02	93	CLERK'S NOTES: Jury Trial Ends, Day eight (hhp) [Entry date 01/25/02]
1/24/02	94	VERDICT for plaintiff Reeder-Simco GMC Inc against defendant Volvo GM Truck Corp (hhp) [Entry date 01/25/02]
3/1/02	100	MEMORANDUM OPINION: by Honorable Robert T. Dawson (cc: all counsel) (rw) [Entry date 03/01/02]
3/1/02	101	JUDGMENT: by Honorable Robert T. Dawson re [100-1], granting pltf's motion for award of treble damages [96-1], granting motion for attorney fees and costs [96-2]; that judgment be entered in favor of pltf against deft & pltf is awarded damages in the amt of $513,750.00 f/its claim under the Arkansas Franchise Practices Act; further ordered that pltf is awarded damages in the amt of $4,074,000.00 on the price discrimination claim brought pursuant to the Robinson-Patman Act and as the prevailing party, pltf is awarded a reasonable atty's fee of $171,095.00 & $25,175.42 in costs; further damage awards shall bear interest at the annual rate of 2.24% from 1/24/02 until paid and the reasonable atty's fees and costs shall bear int at the rate of 2.24% per annum

from date of entry of judgment until paid dismissing case (cc: all counsel) (rw) [Entry date 03/01/02]

3/15/02 102 MOTION by defendant Volvo GM Truck Corp for judgment as a matter of law, alternative for new trial or remittitur (rw) [Entry date 03/15/02]

3/15/02 103 MEMORANDUM BRIEF by defendant Volvo GM Truck Corp in support of motion for judgment as a matter of law [102-1], of motion for new trial or remittitur [102-2], w/exhbs (rw) [Entry date 03/15/02]

4/5/02 106 RESPONSE by plaintiff Reeder-Simco GMC Inc to motion to extend time to resp to deft's motion f/judgment as a matter of law and, in the alternative, f/a new trial or remittitur until 4/5/02 [104-1], w/exhb (rw) [Entry date 04/05/02]

4/5/02 107 MEMORANDUM BRIEF by plaintiff Reeder-Simco GMC Inc in support of response [106-1] (rw) [Entry date 04/05/02]

4/26/02 110 REPLY BRIEF w/exhbs by defendant Volvo GM Truck Corp in support of motion for judgment as a matter of law [102-1], of motion for new trial or remittitur [102-2] (msj) [Entry date 04/29/02]

5/1/02 111 ORDER by Honorable Robert T. Dawson denying deft's motion for judgment as a matter of law [102-1] denying deft's motion for new trial or remittitur [102-2] because the damage is not excessive or conscience shocking (cc: all counsel) (rw) [Entry date 05/01/02]

5/29/02 112 NOTICE OF APPEAL by defendant Volvo GM Truck Corp from District Court

decision, re: order [111-1] dated 05/01/02 and final judgment [101-2] dated 03/01/02 (cc: opposing counsel, Rick Congdon, CR) (mfr) [Entry date 05/29/02] [Edit date 05/29/02]

7/8/02 118 ORDER by Honorable Robert T. Dawson granting motion to stay judgment and for approval of attached supersedeas bond [117-1] Case stayed as to execution of judgment until appeal has been completed (cc: all counsel) (msj) [Entry date 07/08/02]

7/8/02 119 SUPERSEDEAS BOND in amount of $4,784,020.42 by defendant Volvo GM Truck Corp, as Principal and Westchester Fire Insurance Compnay as Surety per Order dd 07/08/02 (mfr) [Entry date 07/09/02]

U.S. Court of Appeals for the Eighth Circuit, Case No. 02-2462:

6/6/02 Civil Case Docketed. Dist. Ct. Office: Fort Smith (cah)

6/6/02 CERTIFIED copies notice of appeal, docket entries, memorandum opinion 3/1/02, judgment 3/1/02, order 5/1/02 (assigned to dgh) [02-2462] [1526204] (cah)

7/19/02 RECORDS received: Transcript, consisting of 6 Volumes of trial held on 1/14/2002 – 1/23/2002 – vols. I, II, III, IV, V, and VI. Location STL. [02-2462] (stl)

7/19/02 RECORDS received: 4 vols. of Deposition. (1 vol. of Robert David Wright held on 5/24/2001, 1 vol. of Suzanne Keith Warren held on 5/22/2001, 1 vol. of Christopher William Patterson held on 5/23/2001, and 1 vol. of Hugh Samuel Johnston held on 5/22/2001) Location STL [02-2462] (stl)

7/19/02 RECORDS received: Miscellaneous Records, consisting of one envelope containing Jury Instructions. [Return to Dist. Ct. at end of case] [02-2462] (stl)

7/30/02 RECORDS received: Transcript, consisting of 1 Volume of pretrial heairng proceedings held on 1/14/2002. Location STL. [02-2462] (stl)

4/15/03 ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Kermit E. Bye, Circuit Judge, Richard S. Arnold, Senior Judge, David R. Hansen, Senior Judge. Michael N. Shannon for Appellant Volvo GM Heavy Truck. Edward J. Kionka for Appellee Reeder-Simco GMC. Rebuttal by: Mr. Shannon. RECORDED. [02-2462] (skh)

7/12/04 THE COURT: Kermit E. Bye, Richard S. Arnold, David R. Hansen. OPINION FILED by Kermit E. Bye, Authoring Judge. PUBLISHED. CONCUR and DISSENT by David R. Hansen. [02-2462] [1786824] (dmh)

7/12/04 JUDGMENT: Kermit E. Bye, Richard S. Arnold, David R. Hansen. The judgment of the lower court is AFFIRMED in accordance with the opinion. [02-2462] [1786832] (dmh)

8/9/04 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellant Volvo GM Heavy Truck, w/service 8/9/04., TO COURT. [02-2462] (dms)

8/9/04 MOTION of amicus curiae, Truck Manufacturers Association, for leave to file an amicus curiae brief in support of appellant, Volvo GM Heavy Truck Corporation's, petition for rehearing en banc; [1798504] TO COURT; w/service 8/6/04 (dms)

8/9/04 BRIEF TENDERED – Brief of Amicus-Curiae (Truck Manufacturers Association) – in support

of appellant's petition for rehearing en banc. – w/service 8/6/04. (dms)

8/27/04 Clerk letter sent notifying that party has an opportunity to respond to petition for Rehearing with petition for rehearing en banc filed by Volvo GM Heavy Truck [1798486-1] [02-2462] Response due by 9/7/04 (dms)

9/7/04 RESPONSE to petition for Rehearing with petition for rehearing en banc filed by Volvo GM Heavy Truck [1798486-1] [1809338]. Response filed by Reeder-Simco GMC. w/service 9/4/04. TO COURT. [02-2462] (dms)

10/6/04 JUDGE ORDER: The motion by the Truck Manufacturers Association to file an amicus brief has been considered by the Court and is denied. The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Gruender would grant the petition for rehearing en banc. Judge Hansen would grant the petition for panel rehearing. [1798486-1] [02-2462] [1819125] [1798504-1] [1819125] – Published Order. (dms)

10/13/04 MOTION of aplnt, Volvo GM Heavy Truck, to stay mandate. [02-2462] [1821181], TO COURT. w/service 10/13/04 (paw)

10/19/04 RESPONSE of aplee, Reeder-Simco GMC, in opposition to appellant motion to stay mandate filed by Volvo GM Heavy Truck [1821181-1] [02-2462] [1824540]. TO COURT. (dms)

10/19/04 MOTION of aplee, Reeder-Simco GMC, for leave to file attorney fees out of time. [02-2462] [1824664], TO COURT. w/service 10/19/04 (dms)

10/19/04 DOCUMENT TENDERED: Application for Recovery of Attorneys' Fees on Appeal (untimely); Document rec'd in St. Louis [02-2462] (dms)

10/26/04 REPLY filed by Volvo GM Heavy Truck regarding motion to stay mandate; TO COURT. [02-2462] [1827014] (dms)

10/27/04 RESPONSE of aplnt, Volvo GM Heavy Truck, in opposition to appellee motion file attorneys' fees out of time and motion for recovery of attorneys' fees filed by Reeder-Simco GMC [1824664-1] [02-2462] [1827040]. TO COURT. (dms)

11/17/04 JUDGE ORDER: denying appellee motion file attorney fees out of time [1824664-1] filed by Reeder-Simco GMC [02-2462] [1835014], granting appellant motion to stay mandate pending the filing of a petition for writ of certiorari. [1821181-1] [02-2462] [1835014] (srd)

In the United States District Court
Western District of Arkansas
Fort Smith Division

Docket No. 00-CV-2031 (RTD)

Reeder-Simco GMC, Inc.,

Plaintiff,

v.

Volvo GM Heavy Truck Corp.,
n/k/a Volvo Trucks North America, Inc.,

Defendant.

Transcript of Proceedings

January 14, 2002 through January 24, 2002

[Testimony of William E. Heck]

[17] A Yes.

Q Let me direct your attention there to Plaintiff's Exhibit No. 1.

A Yes, sir.

Q You recognize that?

A Yes, I do.

Q What is that?

A That is the Dealer Sales and Service Agreement that we signed in 1995.

MR. BYARS: Your Honor, we move for the admission of Plaintiff's Exhibit 1.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted without objection.

Q When this agreement was signed, Bill, what was your understanding of the term of the agreement, how long it lasts?

A The agreement contains language to the effect that it starts out as a five-year agreement, and then every time a year goes by, another year is added at the end of it, so it's always five years. It would, you know, first of all, it would expire say in 2000. Then the next year it would expire in 2001 and so it was always to be a five-year agreement.

Q Let me direct your attention to page 15. That's also section 5.01 of the agreement.

A Okay. Well, that's the five years. You want me to read that or –

[18] Q Yes, if you could indicate – you're talking about this language here that deals with the term. If you would read that paragraph, please?

A The agreement shall be for a term specified in the Term addendum subject to an Annual Performance Review. Unless otherwise stated in the Term Addendum, the term of this agreement shall be for five years. Each year the company shall conduct an Annual Performance Review of the dealer. If the dealer has met its obligations under this agreement including the Portfolio of Criteria, an additional one year shall be added to the term so that the term shall be continuously five years. If the dealer has failed to meet its obligation under this agreement, or the Portfolio of Criteria, the company may, at its option, refuse to modify the term stated in the Term Addendum so that the term decreases by one year for each year of such

failure or replace the Term Addendum with a Probationary Status Addendum of a shorter term.

Q All right. Let's look at the initial Term Addendum on this agreement.

THE COURT: Holly, you want to get those marks off?

Q Which is on page 29.

(Off the record at this time.)

A I'm sorry, Joe. Where did you direct me to?

Q It's page 29 of the agreement and that's entitled Term Addendum. This was the – what was this?

[19] A That came along with the Franchise Agreement in 1995, and it states what we've said.

Q And this is talking about this expiration date here. That' what was included in the agreement?

A Yeah. That's it, March 31st, 2000. Started April 1st, 1995. March 31st, 2000.

Q All right. Bill, what is your understanding of Volvo's obligations under this agreement?

MR. WILLIAMS: Your Honor, I think he just asked, if I understand, what Volvo's obligation is under the agreement. I think he's calling for a legal conclusion, and, of course, the document speaks for itself. I don't think Mr. Heck can characterize –

THE COURT: Well, I think he can summarize it, if he's in a position to do it. Your objection is overruled. I'm going to listen to some of it.

Q Let me direct your attention to page one of the agreement, and if you would look at what the dealers look to Volvo for.

A The dealers depend upon the company to provide a variety of competitive quality products and services and also provide effective sales, parts, and service support.

Q Did the 1995 Franchise Agreement with Volvo provide for the assignment by Volvo of sales objectives?

A Yes.

Q All right. And what was that called under this 1995 [20] agreement?

A I believe it was called a Portfolio of Criteria is that section we read.

Q And who was it that assigned the new sales objectives for Reeder-Simco?

A The District Sales Manager.

Q Okay. Did you know that before this lawsuit?

A Well, I knew that. I didn't know how or – I knew that the did it.

Q All right. Did Reeder-Simco participate at all in the determination of the sales or purchase objectives?

A No, not in the creation of them. We had to accept them.

Q Okay. And tell me how that process worked.

A Well, the way it works, the sales objectives, and there's some other things in there, the purchase objectives are provided to the dealer sometime in the spring or early

summer for the year that you're already in, and it's been done over this timeframe in many different ways. Sometimes the District Manager would bring it in and ask you to sign it. Sometimes the Parts District Manager would bring it in and ask you to sign it. Sometimes they would mail it to you and ask you to mail it back. That was about the extent of it.

Q All right. Bill, would you just describe the function of a franchise dealer?

A A franchise dealer agrees to provide services for customers.

* * *

[22] A Okay.

Q Did you begin to see – what was it about what Volvo did that indicated to you that they wanted you to fail?

A Well, I didn't, in different circumstances, receive the proper pricing so that I can obtain sales and be able to order trucks and fulfill my objectives. And I came to believe that other dealers were able to obtain sufficient price discounts to be able to obtain their level of business they needed to survive and those same discounts weren't available to me.

Q Where does Reeder-Simco look to make its sales in heavy trucks?

A We're restricted to the continental United States, 48 states.

Q Okay. So tell me about Reeder-Simco's actual customer base. Tell me some states where Reeder-Simco has sold or delivered Class 8 heavy trucks.

A Okay. Arkansas certainly, Oklahoma, Texas, Missouri, Iowa, Illinois, Minnesota, Ohio, Pennsylvania, North Carolina, Georgia, Colorado, Oregon.

Q What is the process that Reeder-Simco had to go through in quoting a fleet customer for a Volvo heavy truck under this 1995 Franchise Agreement?

A Okay. Of course, you would establish the relationship of the customer so that they would ask you to give them a price. That's kind of where it starts. And you have to provide [23] assistance in specifying the vehicle. Some customers are very sophisticated. They have a bid list already prepared. They say this is what you have to bid, so you respond to their bid list. Other customers may be not so sophisticated, want some advice or maybe that, so the first thing you do is you create specifications, you then compare the specifications needed to see what's available in Volvo, and that means you have to pick the right model and start seeing if the things can be selected that meet the customer's needs. And that's what the data book was for. The data book was paper. Then it went to a CD rom that you could use on a laptop. Currently the data book resides on a mainframe at Greensboro so to spec out a Volvo truck now you have to be on a computer that can get on the Internet, so once you have the specifications created, you then reduce the price to dealer net which is the list price times 80 percent or a 20 percent discount, so in the case we saw a hundred thousand dollars, the list is $80,000. You would fill out a form before. Now we type it into the computer. It's just a way of communicating it. And you tell

them, you know, what the net price of the truck is and you tell them who the customer is, where they're located, the size of the transaction, you know, be it ten trucks, five trucks, one truck, doesn't matter. You tell them. What is the finance source, you know, be it cash, you know, who's going to finance them? You tell them the competitive situation, you know, who else are you bidding with? Are you [24] bidding against Freightliner, Navistar, Peterbilt, Kenworth or any of those customers or competitors. You tell them what the engine model is, what the transmission is, what the rear axle is, what the tires are, and I think that's most of it. You also have a way to give them a brief sales history, and say, hey, we've never sold this customer before, or, you know, this is another bid for this year. We've already sold them something, et cetera et cetera. So then you submit that, and then depending upon whether it was a fax system, under the fax system, you know, a day later, four days later, you would get a response back. In the meantime you're trying to get your customer to understand that he can't have a price when he asks you for it. You know, he says, okay, we've got this truck figured out. You how much is it? You've got to say, well, give me a chance here to try and get you the best deal possible. So you send in your request, wait a little while, you get it back. And then now this happens on the computer. So when you type this data into the computer, it goes in. You check it every day. It doesn't come back to you automatically. It's just unavailable. So you have to look for it. You go in and see if it's been approved yet. And when it's approved, you obtain this concession percentage that has been mentioned to you already, which is an additional discount from what would normally be dealer price.

Q Bill, let's show the jury an example of what are one of these forms. I'll refer you to Plaintiff's Exhibit No. 143 and [25] I ask that this be admitted into evidence.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted without objection as 143.

Q Okay. Mr. Heck, what is Plaintiff's Exhibit No. 143?

A This is a special price confirmation which is, you could call it, a concession request that we submitted this particular version on February 14th, 1998, to obtain a further discount than what we would have from dealer price so that we could sell trucks to Danmarr Transit.

Q Now, in looking at this particular form for Danmarr Transit, where is it that you requested – what was the concession about that you requested?

A Well, there's a hole through it, but it would be line 15 here it says C O N C dot R E Q, and I think I can make this thing. It's that right there. You see that? My concession request is 7.84 percent. And I might tell you the numbers that are important on this, and there's Vaughn Drum's name. There's ten, you know, quantity ten. There's the model description which is required. The chassis, that's the dealer net price of the chassis that was in existence when this quote was prepared. The options. That's the dealer net price of the options, so if the truck had less equipment, that number would be lower. If it had more equipment, then it would be higher. And then the total is simply the sum of those two numbers. And we've got to consider at this point that this is only the price of the truck and the [26] equipment. It's not the freight or

any of the other various things that we have to include. Quarter year delivery, No. 12, that's February of 98. No, that's second. I'm sorry. I misspoke. That's the second quarter of 1998. So we're in February, so we're saying we expect to be able to deliver these trucks in the April/May/June timeframe and the year model of the equipment will be 1999. And the data book price level, whether it's paper or electronic, is pricing as of 2/1/98, and then we asked for an additional 7.48 discount from what normal dealer prices would be.

Q Now, Bill, when you make these concession requests, do you ask for a dollar amount or a percentage?

A You request a percentage.

Q Okay. And why is that significant in this case?

A Well, because the percentage is so that the specifications of the truck can change without you having to go back through this whole process. In other words, the customer at this point, he doesn't know if the price of that truck is going to be within his reach. So he may wish to forego some item of expense on the truck that he thought, well, I'll just see how much that special fuel filter costs, and if it's too much, I'll just leave it off. So when you put in your concession request, you're trying to forecast as best you can, you know, what the customer is actually going to buy, but the percentage allows you to know how to price that fuel filter. In other words, if they just give you $5,000 [27] or $2,000, and then if you ordered that truck, and it didn't have the content that you had told them it was going to have, you would not be honest about it. You know, if it was less truck than what they thought you were going to have, and they gave you $3,000, and maybe they should have only given you $2,800, and it would also be extremely

difficult with dollars to have any kind of parity between dealers, because two dealers might be able to interpret the specifications differently. You know, one might take the guy's specification one direction. Another one might just have a little bit of difference over here. That's why –

Q Well, the prices – all of these specifications have their own prices, don't they?

A They have their own list price.

Q Okay. And so if you've got a difference between the pricing and the various options, how does that interplay with the percentage? You know, you're requesting a percentage discount with Volvo, aren't you?

A Yes.

Q Okay. So if you have a difference in a certain brand of option, for example, they're already price different, is that correct?

A Yes. And you apply the percentage, you know, whether it's an engine price of, you know, $3,000 or a different engine at $2,950, you would net them down to dealer price and then take that same percentage on both engine options. You know, that's [28] the reason why it's a percentage and not a flat dollar amount.

Q Okay. Now, in this particular example you've got, how did you come up with 7.84 percent?

A The explanation is down in the comment section, if you would raise that up so that we can read that . . . Okay. This is not the first, first concession request, you know, I'll try to stay with that description the whole time.

Q All right.

A This is not the first concession request for this transaction to sell Danmarr Transit. We had already requested concession, and as it says below, it says comments. It says quoted trucks to customer and that's $72,770 and that price includes 12 percent federal excise tax, and it includes whatever it takes, you know, to get it to the customer. If we have to do something, a little something in the shop, you know, that's what we priced it to him for including the taxes. We were keeping $2,000 profit for ourselves. We were contemplating buying 30 days floor plan from the factory. And using the four percent concession that's been approved earlier, Dan, who is the Dan Bearden in the DanMarr, you know, it's Danmarr, which is Dan Bearden, Dan informed me that he could buy Prosleepers, which is an international product in stock for less than $70,000. So he's saying, hey, you know, at this price I'm not buying from you, you know, I need – and, you know, he said that he would pay $70,000 for our trucks. And then he gave me a chance to get to the [29] $70,000. So I figured the deal backwards, you know. I knew it was $70,000 and I took it backwards so that I could decide what concession percentage was required so that I could sell it for $70,000, and that's how come I asked for 7.84. Ordinarily, I'm not smart enough to know what the hundreds of a tenth or hundreds out there ought to be. You know what I'm saying? But this is exactly what it takes to sell that truck in that circumstance.

Q All right. So you first submitted a concession request and whose signature is that?

A That's Mike Truta.

Q All right. What, out of your first request, did he approve?

A As I recall, it was four percent.

Q Okay.

A Because that's how we quoted it.

Q And then out of your request for 7.84, what was finally approved?

A 5.6 percent.

Q All right. And was that enough to get the deal –

A No, sir.

Q – in this case?

A No.

Q Let me have you now look at Exhibit No. 240-A. I move for the admission of 240-A.

A Okay.

MR. WILLIAMS: No objection to 240-A, Your Honor, at [30] this time.

THE COURT: Be admitted without objection as 240-A.

Q Mr. Heck, what is this document?

A This is a printout that we derived from information we received from our, I believe you call it discovery process, where Volvo made available to us sales data from what they termed the Southwest Region, and were able to extract that information from what they provided.

Q All right. And you see the dealer net here, this column? What does that represent?

A That dealer net is the total of the base model and the options as was listed on the previous concession quote. You know, if the base model was $60,000 and the options were 7,011, that's what that number is. That's just the sum of that, you know, those two numbers.

Q And –

A That's the dealer net.

Q What was the concession amount for this – well, does this printout reflect what another dealer got for sale to Brookshires Grocery?

A Yes, sir.

Q What was the concession percentage on this transaction?

A 12.3 percent.

Q And you see this column here that says postmark date?

A Yes.

[31] Q What is the postmark date?

A February 26th, 1998.

Q Okay. What is meant by a postmark date?

A Well, the postmark date is the date that the factory receives the Order by whatever means they receive it, and by that I mean that at one point in time they were mailed and at another point in time they were faxed. Currently it's an electronic submission. You put the electronic truck order on the computer and it's instantaneous

for all practical purposes, but that's the first date that the factory knows that the dealer wants this truck.

Q All right. And how does that correspond to the Danmarr Transit at the time you requested this concession for Danmarr Transit?

A Well, you notice on February 14th we sent in and advised them that we needed the 7.84 to be able to sell these 10 trucks. And then over on the right hand side there's some date. I can see it a little easier on my copy here. It says faxed back to dealer on and it says 2/16/98 and 2/26/98, so all things being equal, you know, if there weren't some other, you know, delays, I don't recall what day of the week that was, but we would have ordered these trucks quite possibly on 2/26/98. Because once we had the number agreed to, Mr. Bearden had already agreed to buy them for that.

Q Now, let me have you look at Plaintiff's Exhibit No. 240. [32] What is this?

A This is –

MR. BYARS: We move for the admission of 240.

THE COURT: Any objection?

MR. WILLIAMS: Just a minute, Your Honor. I don't have it – haven't seen it yet. (Pause) No objection, Your Honor.

THE COURT: It will be admitted without objection. I also think, Mr. Byars, you maybe can make that a little larger, too, on your copy.

MR. BYARS: Yes, Your Honor. Would you explain what this is, Mr. Heck, Exhibit 240?

A 240 is the equivalent of a factory invoice. This is data that was provided as a result of our lawsuit by Volvo, and we had the ability to extract information from that database, and this is a printout that we obtained, and it shows some identifiers over here and so forth. You want me to run through it?

Q Well, what I would like to have you point out is this is an invoice to another Volvo dealer, is that right?

A Yes, sir. This is, this is Barrett Truck Center that I happen to know is in Tyler, Texas. It's Bill Barrett.

Q And the postmark date shows up on this invoice, is that right?

A Yes, it does.

Q That's the date that the trucks were ordered?

A Right, line 17; yes.

[33] Q Okay?

A Yes.

Q And on this invoice, what did this dealer purchase?

A Well, he bought a VNL 64 T and then the cab style on this one happens to be on the second page, so it's a 420. Back at this point in time the 420 was not necessarily part of the model number. It was a VNL 64 T, which was described a tandem VN which is a nice truck, and the 420 sleeper. And it's saying that the base chassis price – see the list there 70,298, and then the dealer net is 56,238.

Q All right.

A Which you could come to our request on line nine where we stated our chassis price to be 56,238.

Q So that the chassis price and your request on your quote to Danmarr Transit is the same chassis price that's shown on –

MR. WILLIAMS: Your Honor, about three times I've heard this and I didn't object, but I'm objecting now. That's leading.

THE COURT: Yeah, try not to lead, but I think he's trying to expedite matters somewhat, but try not to lead.

Q Okay. You're pointing out on the invoice to the other Volvo dealer the same concession price?

A No, it's not the same concession. It's the same base model.

Q I'm sorry.

A And the concession amount at this point in time on this invoice it shows zero, and I might mention down here on line 34 [34] and 35, you need to push that up a little bit, the concession amount is zero at the time this truck was invoiced. Then you go to the back and the line number 163, it's one, two, it's the fifth page, the concession amount is the 8242, which calculates out to the 12.3 percent, 12.3 percent.

Q So this other Volvo dealer using the same model, same model year, same chassis price, received a 12.3 percent concession?

A Sure. Yeah.

Q And you were approved for?

A 5.6 percent.

Q All right.

A So it makes the – makes most of the difference in the price of the trucks go away.

Q All right. Why would, why would this other dealer get a higher concession?

MR. WILLIAMS: Objection, Your Honor; calls for speculation.

THE COURT: I think it may, but I'm going to let him answer if he knows. Do you have any way of answering that?

A I can't specifically tell you that.

THE COURT: I will sustain your objection.

Q Before this lawsuit was filed and we obtained any information such as this, did you have – were you suspecting that there were differences in concessions being granted to other Volvo dealers?

[35] A Yes.

Q All right. And how did you suspect that?

A Well, the two main reasons, when they were faxing the concession approvals back to the dealers over a fax machine, they must have used some fax in Greensboro where the operator could hit the wrong button and we would receive other dealers' concession requests on occasion. And they did not – they were higher, you know, they

appeared to be higher levels than what I was used to getting, and that got me to starting to wonder.

Q All right.

A And then the other main reason is I couldn't find out why we weren't more successful in selling these trucks. Had to be some explanation.

Q What did you do with those concession requests that were faxed back to you?

A Oh, some of them I faxed them back to Greensboro. I didn't want to get the person in any kind of trouble. And I just threw some of them in the file, and some of them after I – you know, some of them I faxed to the correct dealer, you know, because I would read them, and if the thing was due right away or, you know, looked like they had been waiting for it, I would just fax them on to them.

Q And when did you start recognizing that?

A I can't be sure exactly, but somewhere in this timeframe.

Q The 1998 timeframe?

[36] A Yeah, 97, 98, 97.

Q All right.

A 98.

Q Is there anything that happened in 1997, 1998, which made you believe that Volvo was not dealing with you in good faith or in a commercially reasonable manner?

A Yes. 1997.

Q What happened in 97?

A Well, they sent us a notice of a – put us on probation.

Q Okay.

A Yeah.

Q What else did you receive in late 97?

A Well, in late 97 we got a memo, a memo – Volvo has an electronic communication system where you can e-mail back and forth, but it's not like e-mail. It just appears. And you can read it or not. If you don't do anything with it, it will just stay there. And once you delete it, it's gone. You know, you read it. If you want to get rid of it, you can get rid of it. If you leave it there, it will stay there for two years. So we got a memo over that system that described the Volvo Vision.

Q All right. Let me have you take a look at Plaintiff's Exhibit No. 101.

A Okay.

MR. WILLIAMS: Your Honor, we object to this document.

THE COURT: Let's approach the bench, please.

[37] MR. WILLIAMS: Thank you, Your Honor.

(The following proceedings were had at the Bench between Court and Counsel, and out of the hearing of the jury:)

MR. WILLIAMS: If I can show it to Your Honor, it's 101. This is a Reeder document from Reeder-Simco.

This is an incomplete document. They're trying to put only part of it in. It says "due to the 2000 glitch" . . . It's a multi-page document. They are putting in one sheet of it and that's not fair. They've got to put in the whole document in.

THE COURT: Where's the rest of it? Do you have the rest of it?

MR. BYARS: Judge, this was – when it came in –

THE COURT: The way it came in from where?

MR. BYARS: The way it came in from Volvo over the electronic submission. Bill Heck made a copy of this page and he kept a copy of this page.

THE COURT: But you're telling me this came from Volvo as opposed to –

MR. BYARS: Yes, Your Honor.

THE COURT: I tell you what I will do, though, on Exhibit 101. I will let you voir dire on it, sir.

MR. WILLIAMS: Okay.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: I'm going to permit you to voir dire on [38] Exhibit 101, should you desire.

MR. WILLIAMS: Yes, Your Honor. Thank you.

VOIR DIRE EXAMINATION

BY MR. WILLIAMS:

Q Mr. Heck, looking at Exhibit 101, you can identify this document by the Bates number, this is a document that came from Reeder-Simco's files, is that correct, sir, looking at the bottom?

A I don't see the R S there, but it probably did. 2004, is that one of our numbers?

Q I believe that is, Mr. Heck. Do you have any reason to dispute that right now?

A No, I just don't know.

Q Okay. Thank you. And this document, I don't want to get into the content of it, but I want to ask you about the document. This is something as best I can make it out, you tell me if you disagree. This is part of a multi-page document. Would you agree with me, sir?

A Yes, I would.

Q Okay. And do you have the rest of this document?

A No, sir.

Q And this document was dated or it came to you, if I see it correctly, this is in January of 1998, is that correct?

A That was the date this document was printed out. Yes.

Q Okay. And you've already testified that it was at that time [39] you were already suspicious about Volvo, correct? It was in 1997 that you got suspicious?

A I'd say that's fair.

Q Okay. So we have a multiple page document which now we only have one page from it. Is that correct?

A Yes.

Q What happened to the other pages to this?

A I don't know.

Q They were in your control and possession, is that correct?

A If I got all of them. I can't tell you why the rest of then are missing.

Q Looking at this document, you're much more familiar with these than I am, I'm sure. At the top it says page. Is that saying page three or page 13?

A I suspect it's saying page 13.

Q Okay. So we are on the 13th page of a 13-page document and all we have is one page. Whatever came before, we don't have before us, correct?

A That's correct.

Q And whoever was saying whatever in this document, other than what's on this page, we don't have that and you don't have that in your evidence today, is that correct?

A I don't have evidence as to the previous 12 pages.

Q Okay.

MR. WILLIAMS: Your Honor, we do object to this. I [40] mean they have got a brief part of a document.

THE COURT: Let me ask you this: Who did the document come from? Was it generated by Volvo?

A Yes.

THE COURT: Do you know how you obtained it?

A I believe Barbara Rosetti gave it to me.

THE COURT: And how would she have given it to you, just handed it to you or –

A Yes, she came and visited us. She had called it to my attention, but, see, the destination on top, it says destination the destination is Barbara Rosetti.

THE COURT: Who is Barbara Rosetti? I'm apparently the only person in the courtroom who doesn't know who she is.

A Barbara Rosetti is a Volvo – at the time she was the Dealer Development Manager for the Southwest Region. She was working is Greensboro, North Carolina, and by the date of this letter we had already had discussions and correspondence back and forth with Barbara Rosetti.

THE COURT: So you don't know if you have the other 12 pages or if that's the only page you've got?

A I'm certain I don't have the other 12 pages.

THE COURT: Did you ever see the other 12 pages?

A I think I may have. I can't tell them what this is in reference to, though, right?

THE COURT: Where would the other 12 pages be, or when [41] would the 13 pages be now? Would Volvo have a copy of that in their file?

A Should. Well, no, I can't speak to how long they keep their records. I don't know.

THE COURT: Okay. What's the date on it?

A The date on top is maybe January 7th or January 2nd of 1998. So it's approximately three years old.

MR. WILLIAMS: Your Honor, if I might, one more follow up question?

THE COURT: Yeah, one more.

MR. WILLIAMS: Thank you. Well, maybe more than one.

Q This says – this is also is like a title at the top. It says December 97 update. Do you see that? On the document it was referring to 97 December update?

A I see that's the title of it.

Q Right. Did you get periodic updates from Barbara Rosetti about dealer matters on a periodic basis where she would send out to the dealer body, dealer principals such as yourself, memos in electronic in this form somewhat like an e-mail now?

A Not on a regular basis; from time to time. This was in reference to something.

MR. WILLIAMS: Your Honor, we would stand by our objection.

THE COURT: I'm going to admit it over your objection. Be admitted as Plaintiff's Exhibit 101.

[42] CONTINUING DIRECT EXAMINATION

BY MR. BYARS:

Q Mr. Heck, you received – this is a copy of an electronic message – would you just explain what this electronic message system is between Reeder-Simco as a dealer and Volvo?

A It is, it is a form of electronic mail. It's very similar to e-mail. I have an address. My address is 5711DO1. And I can send electronic mail to Miss Rosetti or anyone else at Volvo. There's a directory. You can look it up. I can send e-mail to another dealer and they can correspond with me. It's e-mail. It's just a form of e-mail.

Q And Barbara Rosetti with Volvo, was she with Volvo at the time that you received this document?

A Yes, sir.

Q And up here at the top it says the Volvo Vision was discussed, is that correct?

A Right.

Q Everybody see that?

THE COURT: If you have to make it larger, you can.

Q And there's two columns. One column on the left says Volvo Challenge and the column on the right says Volvo Vision, is that correct?

A Yes.

Q Under Volvo Challenge it says too many dealers, is that right?

[43] A Yes.

Q Under the column that says Volvo Vision, fewer dealers, larger markets?

A Yes.

Q And on the Volvo Challenge, under-performing dealers, dealerships, low profitability, under four percent net goal. What did you understand that to mean?

A Well, under-performing dealers meant that obviously they thought the dealers should be doing a better job than some of them were, and at the same time the dealers had lower profitability than what they expected a dealer to have. That's what that meant to me.

Q Okay. In other words – well, look at the Volvo Vision. We've got consistent profitability, four percent.

A Right.

Q What did you understand that to mean?

A Well, in my experience what – well, what I understood that to mean was that they wanted their dealers to consistently be at the four percent net profit.

Q And what is that?

A That means that on revenue, you know, if your revenues are going to be a million dollars, your profit should be 4 percent of that net.

Q All right.

A And you know, again, this is – we had already been involved [44] with Miss Rosetti, and I'm, I'm – at this point I'm a little concerned about how the challenge is that the dealers are not profitable and I'm considering part of this poor profitability to be the fact that the trucks are not priced correctly to me, so I can't obtain profitability. Now, that's where I'm starting to understand I think.

Q And under the Volvo Challenge, it says average market size 1100?

A Yeah, and then –

Q And then the Volvo Vision was a market size of 2500?

A Right.

Q What did you take to that mean?

A Well, what that says is that they didn't want, dealers in small markets, but I tend –

MR. WILLIAMS: Objection, Your Honor. I think he's speculating now.

THE COURT: Well, he may be, but I'm going to let him – he's vice president of the company he can testify what it meant to him. Your objection is overruled.

A Well, it says the average market size 1100 is a challenge. And the vision is 2500 market size. So you would have to eliminate dealers to raise the market size.

Q Under the Volvo Challenge it says owners now 146 and the Volvo Vision says Vision, 75. What is your understanding of that?

[45] A Excuse me?

Q What is your understanding of that?

A Well, says right now, which was 1998, you know, December 1997. There's 146 owners, and the thing to keep in mind is that this is owners. This is not necessarily dealer points. you could have an owner that might have two locations or more. And so their vision, their plan was to have the number reduced from 146 to 75.

Q Then you have the Volvo Challenge of full-line dealers 169 and the Volvo Vision of 175. What would you take that to mean?

A Well, again, they're reporting that the current 146 owners are operating 169 points, so, again, some of the owners have more than one point, and their vision is that they have 75 owners and they operate at 175 points, so that would reflect a growth in dealer points of six, you know, from 169 to 175. You'd have to have six more locations to be able to do that, but you would have fewer owners.

Q All right. And that was part of a, says December 97 update? What was your understanding? I mean is this – was this a type of e-mail that you would receive updating dealers on current events or current meetings of Volvo?

A It's more a meeting summary. In other words, it would, you know, give you an update of any meetings that had took place in – see by the wording in and of itself it says the Volvo Vision was discussed. So at some meeting they're referencing [46] they discussed the Volvo Vision. And we heard more about the Volvo Vision. This is not the only, you know . . . This is not it.

Q What else did you hear about the Volvo Vision?

A Well, you know when I got this, you know, we thought it was, you know, something we weren't used to seeing, and then I went to a – there was an annual dealer meeting held in Marco Island, Florida, in early March 1998. And Volvo dealer principals were invited. I believe you could take, you know, like a general manager along if you wanted to, and it was a kind of an annual, you know, get together to, you know, tell you what was going on. Ordinarily what they would do is pep you up and tell you about some new ideas and what you need to get back and sell more models. GM does the same thing, you know, get you revved up. And that's usually what they are for. But the March meeting in Florida was quite different.

Q Would you explain what you heard, what went on at this meeting in Marco Island?

A At Marco Island it was one of the first times I had seen Mark Gustavson. Mark Gustavson was the – I'm not sure. I think he was a president, but he was, he was the lead man for Volvo Trucks North America or it might have been Volvo GM, probably Volvo Trucks North America, and he gave a keynote speech and there were two other speakers there as well. This was more than a one-day meeting. I think it lasted three or four days. And there were two other speakers. One of them was a fellow by the [47] name of Lou Kaysich (phonetic), who was a mountain climber, and the other one was a University of Michigan football coach. I believe his name is Mr. Carr, but at that time he wasn't a football coach. And I was looking forward to his talk because I'm a U of M alumni and –

Q What was the message by the mountain climber?

A Well, that was, that was when – the mountain climber, in 1996, in May of 1996 there were very many what they call commercial expeditions to climb Mount Everest and a lot of people died. And this man, Kaysitch (phonetic), he got within about a hundred meters of the summit of Mount Everest and he thought that that summit was the goal of his life, you know, he wanted to do that. And he wrote a book called "Into Thin Air" and described in the book as well as in this speech that when he was within that hundred meters and I don't go too deep –

THE COURT: I don't think we are going much further. I've read "Into Thin Air" and I've been cold ever since, but were you going to ask him what Mr. Gustavson said or whatever at some point?

MR. BYARS: Yes, Your Honor, but I think the message from this speaker has some relevance in this.

A I'll cut right to the chase.

THE COURT: I'd like to hear it.

A He said you got to give up sometimes. You know, you just got to learn to give up before you achieve your goal. That was [48] his message.

Q All right. And what about the football coach?

A Same thing. He said you had to learn to accept defeat and lose.

THE COURT: Was this a real uplifting meeting you were at? Go ahead. Let's talk about Mr. Gustavson now.

Q What did Mr. Gustavson say? Who was he.

A Well, he was the president. He's the head guy.

Q What did he say?

A He said pretty much the same thing reflected in this memo. He said the Volvo vision is, you know, we're going to get – 50 percent of the dealers are going to be out of business in two years, you know. He said a lot of things, but not to get into long story, you know, he said the ones that are going to survive are going to have to learn how to salute the flag, you know. I don't agree to that. You know, I salute one flag. The flag he was referring to wasn't our flag.

MR. WILLIAMS: Your Honor, I'm objecting to that. He's now getting into argument and speculation.

THE COURT: Well, I'm sustaining that objection. Do you have other questions of this witness before we take a break? Ladies and gentlemen of the jury, we're going to take – I'm almost afraid to ask. Do we have any smokers on the jury? I'm not fussing at you. I just need to know. None? Okay. We then will take about, oh, let's do about an 18-minute break. Every [49] clock in this building has a different time, so – but if we can, let's try to work on this one, and I think if we can be back at five after, that ought to be 18 or 19 minutes. We're going to remain seated until you're out of the room. Remember the previous admontion of the court, to not discuss it with anyone or allow anyone to discuss it with you. Have a nice break and we'll see you in 18 minutes.

(Jury leaves the courtroom at this time. The following proceedings were had outside of the presence and hearing of the jury:)

A Can I take a break, too?

THE COURT: Yeah, just a minute. Yeah. Let the record reflect that the jury is out of the room. Anything anybody needs to put on the record with the jury out of the room?

MR. WILLIAMS: Your Honor, just to make my record on the Exhibit, I believe it was –

THE COURT: 101?

MR. WILLIAMS: 101. I offer to renew my objection and move to strike the Exhibit on the grounds that the Plaintiffs appear to be – have – intentionally are not engaged in spoilation of evidence. They have a 13-page document which I think the context clearly would have added something to the meat of this and that they should have had in there. There is an inference which should be drawn from their failure to produce the document.

[50] THE COURT: Is there any reason why Volvo can't produce it if it's a Volvo document?

MR. WILLIAMS: Your Honor, these are e-mails, and these are like our e-mails, your e-mails, they clean them out, and I don't know that we can, Your Honor.

THE COURT: Unfortunately, I don't think mine ever get cleaned up. But I think part of the problem with this is this may have been before we perfected e-mail very much. This may have been back in the old days.

MR. WILLIAMS: This a different system for sure. It's essentially the same.

THE COURT: It's something kind of pre-e-mail, I think.

MR. WILLIAMS: Right.

THE COURT: Anything further? I'm going to overrule your objection, but note your exception and I'll be giving you continuing exception and objection to it.

MR. WILLIAMS: Thank you.

THE COURT: Tell me how much longer you're going to be with him you think or how much more have you got or can we finish with him today.

MR. BYARS: I don't believe so. We'll be just about finished with him by the end of the day.

THE COURT: Okay. I've got one juror that I need to maybe get to her place of employment a little early, but if we have to go till 5:00, we will certainly do it. Are you going to

* * *

[52] Q Mr. Heck, let me direct your attention to Plaintiff's Exhibit 100.

A Yes, sir.

Q What is that?

A This is a memo out of the Volvo memo system and it's the Gustavson letter dated March 1998.

MR. BYARS: Your Honor, I'm going to move for admission of Plaintiff's Exhibit No. 100.

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: It will be admitted without objection as Plaintiff's Exhibit No. 100.

Q Mr. Heck, was this submitted after that meeting in Marco Island, Florida?

A Yes.

Q All right. And let me just have you read the paragraph starting right here, if you can see that.

A Mark keynoted the meeting by stating that Volvo intends to achieve the best distribution network in the business. Speaking to customer demands for increased service among fierce competition, Mark indicated that 50 percent of Volvo Truck dealers would not be in business in the next few years.

Q All right. This was, this was stated in the Gustavson letter March 1998?

A Yes.

[53] Q All right. Bill, what did you do in response to this Volvo Vision?

A I decided that I would do everything I could to not be in the 50 percent that was eliminated and I would take whatever steps necessary to survive.

Q All right. And what steps did you take?

A I requested permission from Volvo to locate across the street, and I hired additional sales people.

Q And who did you correspond with in regard to your request to move across the street?

A Stan Boris.

Q And who is Mr. Boris?

A At the time Stan Boris was in charge of their dealer development operation on a national basis out of Greensboro.

Q And did Mr. Boris correspond with you in writing?

A Yes, sir.

Q Let me direct your attention to Plaintiff's Exhibit No. 46. Your Honor, I understand there's no objection. If I can just put it up?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: It will be admitted without objection.

Q Is Exhibit 46 a copy of a letter you received from Mr. Boris?

A Yes, sir.

Q Would you just tell the jury what it says?

[54] A This is a copy that says, "Dear Bill, in response to your previous letter – or letter of March 10th and previous discussions with Mike Truta, we will approve your relocation of the sales and truck inventory to the body shop location across the street with the following caveats, and he lists out five requirements.

Q All right. And how does he conclude this letter here?

A He says, however, our conditional approval of this location in no way is considered a commitment on our part to maintain you as a dealer.

Q No commitment by Volvo to maintain you as a dealer, and for a waiver by Volvo of any deficiency or violation of the Dealer Sales and Service Agreement or the applicable Portfolio of Criteria, is that what that says?

A Correct.

Q At this time had you received some letters concerning the objectives that were assigned by Volvo?

A At this time we had been receiving them I'd say six to – for six to nine months, somewhere in that neighborhood.

Q All right. What did you think at this time that Volvo was doing with those objectives?

A I had decided that they were using the objectives to put Reeder-Simco out of the Class 8 business.

Q And how is that?

A Well, they would not allow us sufficient price reduction to [55] obtain our sales necessary to meet our objective.

Q Let's talk about your objectives. What – and I'm going to refer you to Plaintiff's Exhibit No. 5, which sets forth your objectives for 1995. Your Honor, I move for the admission of Exhibit 5.

MR. WILLIAMS: Just a moment, Your Honor. Your Honor, I think this falls within the heading of one of our – if I may approach the Bench . . .

THE COURT: Yes, you may.

(The following proceedings were had at the Bench between Court and Counsel and out of the hearing of the jury:)

MR. WILLIAMS: This is No. 5, Market Objectives of Volvo. That falls under the terms of our time bar claims because it's not –

THE COURT: Is there going to be some monetary, some damages in connection with that?

MR. BYARS: No. I mean we're using that as just to show what the objectives were and what Volvo did with those objectives for 1995.

MR. WILLIAMS: To the degree he's saying that they set the objectives and then took action in 95 to prevent them from meeting, and I think it's time barred.

THE COURT: Well, I'm going to admit it.

MR. BYARS: I don't think any kind of a letter was ssued concerning the 1995 objectives.

[56] THE COURT: I'm not sure I understand your objection to this then. You know, I know it's 1995, but I think the original franchise is also 95.

MR. WILLIAMS: That's true. The five-year agreement that runs from 95 to 2000, so I didn't object to that because it covers the applicable period.

THE COURT: Was this a one-year plan, the one you're looking at there?

MR. WILLIAMS: Yes. This is the –

MR. BYARS: This is what was issued with the agreement. I mean . . . we wanted to show what these started with.

MR. WILLIAMS: I'm sorry. I thought that Mr. Heck's testimony was that he didn't get those. They were going to put him out of business, so I was assuming he was going to have some claim based upon this that they couldn't make these objectives based upon Volvo's actions.

MR. BYARS: I don't think there was any kind of a letter issued by Volvo about this letter. We just want to show what the objectives were in 95.

THE COURT: When they started?

MR. BYARS: When we started with this.

THE COURT: I think that's permissible. If you still object, I'll overrule it. Is that No. 5?

MR. WILLIAMS: Yes, Your Honor, it is No. 5.

THE COURT: Thank you.

[57] (The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Can you all see why my court reporter is so skinny? He runs back and forth to the end of the deal there. It will be admitted as Plaintiff's Exhibit No. 5. Continue, please, sir.

Q Mr. Heck, this says 1995 Marketing and Business Plan, Mr. David Reeder, Reeder-Simco White GMC, Southern White GMC, Volvo GM Heavy Truck. Was this issued after you signed the franchise agreement in 1995?

A Yes.

Q All right. And the second page here, what does this describe?

A Overall it shows briefly registrations in Class 8, how many trucks are registered, you know, for that year. It shows 1994, 698; 1993, 672. Projected market size competitive ranking, you know, things such as that.

Q What does that total registrations mean?

A Well, it's an annual.

Q Pardon?

A That's an annual registration of new trucks.

Q Class 8?

A Yes, annually.

Q All right. And then – I'm sorry. I need to see your page. This is entitled Sales Planning Potential and New Truck Retail [58] Sales Objective. Did you understand this to outline your objectives as set by Volvo for 1995?

A As far as it relates to truck sales and engines.

Q All right. Here it says the retail sales under new Class 8 is 94. Does that mean 94 units?

A Yes. That's our objective.

Q Okay. And these two columns here, VED 12 and VED 7, what are those?

A VED 12 is 12-litre Volvo brand engine, and VED 7 is a seven-litre Volvo brand engine.

Q All right. This down here under 1995 objectives says White GMC purchase objective $738,900. What is that?

A That's a requirement or an objective that we purchase $738,900 worth of parts from Volvo.

Q That's for the year 1995?

A Correct.

Q All right. Let's take a quick look at what your objectives were in 94 before this agreement, and let me direct your attention to Plaintiff's Exhibit No. 3. Your Honor, we move for the admission of Plaintiff's Exhibit 3.

THE COURT: Any objection?

MR. WILLIAMS: No, Your Honor.

THE COURT: Be admitted without objection as Plaintiff's 3.

Q If we look at this, Mr. Heck, for 1993, says 1994 Forecast [59] of Operations White GMC and Class 8 Volvo Trucks, and then there's the number 44, is that right?

A Yes.

Q So that meant in 1993 you had a sales objective on Class 8 of 44 units?

A In 1994 I believe you meant to say.

Q That's correct. I'm sorry. 1994.

A 44.

Q All right. And it went to 94 in 1995, right?

A Right. And the registrations held about the same. In fact, they went down a little.

Q Okay. Well, we are looking at the market as they describe it in 1994 where the average analyzed for 1993 was 689 registrations, is that correct?

A That was the total for 1993 on an annual basis.

Q All right. And in 1994, which is under your 1995 objectives, it was 698.

A Right.

Q Is it your understanding that from Volvo that they determined your objective based on the market or the registrations?

MR. WILLIAMS: Objection, Your Honor; calls for speculation.

THE COURT: I don't understand the question. If you understand it, you can – you want to rephrase the question?

[60] MR. BYARS: Sure.

Q What is your understanding of how Volvo determined the objective for 93 and 94?

A Well, they applied some percentage to what they expected the total registrations to be.

Q Okay. And your 1995 marketing business plan showed registrations of 698. And your 94 business plan showed registrations of 689. But the increase in your objectives was about – well, went from 44 to 94, didn't it?

A More than double.

Q What were your actual sales in 1994 for Class 8 heavy trucks? Refer you to Exhibit 268.

THE COURT: Exhibit what, sir?

MR. BYARS: 268.

THE COURT: Mr. Shannon, Mr. Williams, you may both move, if you'd like to.

MR. WILLIAMS: Thank you, Your Honor.

Q Your objective for 94 was 44 units. What were your actual sales for 94?

A 65.

Q Your objective for 1995 was 94 units, is that right?

A Yes.

Q What are your sales for 1995?

A 72.

Q All right. So you met your objective in 94 and then there [61] was an improvement in sales in 95, but you didn't make your objective, did you?

A Correct.

Q Next let me refer you to Plaintiff's Exhibit No. 7.

A That's what's entitled a 1996 Marketing and Business Plan.

THE COURT: Did you move to introduce 268?

MR. BYARS: We do – we now so move, Judge.

THE COURT: Any objection to 268?

MR. WILLIAMS: Not to this Exhibit, Your Honor – we'll –

THE COURT: It will be admitted as Exhibit 268. I'm sorry. Go ahead, sir.

BY MR. BYARS:

Q Take a look at Exhibit No. 7. That's your 1996 marketing plan?

A Yes, sir.

Q Is that correct?

A Yes, sir.

MR. BYARS: Your Honor, we move for the admission of Plaintiff's Exhibit No. 7.

THE COURT: Any objection?

MR. WILLIAMS: Just a moment, Your Honor. He kept moving around the numbers here.

THE COURT: I thought I was the only one that was confusing.

[62] MR. WILLIAMS: If I may have one moment, Your Honor, with Mr. Byars.

(Off the record at this time.)

THE COURT: Was there an objection?

MR. WILLIAMS: Your Honor, there were some notes on here that someone's made, and subject to that – they're apparently added after the fact, I'm not objecting to it, but those are obviously not part of all of those records, whatever scribbling that was put on it after the fact.

THE COURT: Okay. You either need to take off the scribbling or block it or have an explanation for it of some sort.

MR. BYARS: Let me just use what Volvo produced, Judge, and I'll refer Mr. Heck to Plaintiff's Exhibit No. 9.

THE COURT: Are you withdrawing No. 7 then?

MR. BYARS: Yes, Your Honor.

(Off the record at this time.)

THE COURT: Any objection to No. 9.

MR. WILLIAMS: Yes, sir. Same objection. It's got the same marks on it.

Q Mr. Heck, if you will look, take a look at Plaintiff's Exhibit No. 9, please?

A Yes, sir.

Q On page four?

A Yes.

[63] Q Is that your writing?

A Yes.

Q And on page five, is that your writing?

A Yes.

Q And did you make those notations at or near the time that this 1996 marketing and business plan was submitted to you by Volvo?

A Yes, sir.

MR. BYARS: We move for the admission of Plaintiff's Exhibit No. 9?

THE COURT: Still object?

MR. WILLIAMS: No, not with that clarification, Your Honor.

THE COURT: It will be admitted without objection as Plaintiff's No. 9.

Q Now, this says the 1996 Marketing and Business Plan, is that right?

A Yes, it does.

Q In the agreement, the franchise agreement you referred to a Portfolio of Criteria, I believe. Do you remember that?

A Yes.

Q Did you ever understand what a Portfolio of Criteria was?

A We thought we had an understanding, but it turned out I don't know. We asked and we never have understood.

Q All right. But you understand these 19, this 1996 Marketing [64] and Business Plan to be the objectives assigned by Volvo, is that right?

A Yes, I do.

Q And your objective for 1996 in new Class 8 sales was 89 units, is that correct?

THE COURT: I think you can make that a little larger, too, Mr. Byars?

A Yes, that is correct.

Q All right. And what were your actual sales in 1996?

A 66.

Q You see on the next page of that Exhibit says 1996 after market objectives? And under Class 8 vehicles in operation says 4,705 and that you circled that and said no?

A I circled that as well as the per truck potential and said no.

Q Why is that? What does that mean?

A It means that there are not 4,705 Class 8 vehicles in operation, and that they do not represent $3,800 apiece in part sales.

Q Okay. Do you recall the registrations that we looked at for 94 and 95? I think it was like 689 and 694. Is that what that is also talking about?

A Excuse me?

Q On these prior objectives that we just reviewed, is that the same – is that attempting to show the same type of information?

[65] A No. No. It's a change in method. It's from an annual registration now that's shifting to a total vehicles in operation of some type.

Q All right. And you disputed that number?

A Correct.

Q What was your parts purchase objective under this document?

A Purchase objective was 250,000.

Q That's shown here. We show the 1995 numbers and then the 96 objective of 250,000?

A Yes.

Q Is that right? This next section, page seven, this shows some gross profit figures?

A Yes.

Q And that's – these were issued by Volvo to Reeder-Simco, is that right?

A I believe that's correct; yes, sir.

Q And for Volvo Class 8 trucks they list the per unit gross profit for the new trucks of $2,500?

A Yes.

THE COURT: Again, Mr. Byars, you can make that larger.

MR. BYARS: Okay.

THE COURT: What you're looking at is a lot clearer to you than it is to me and the jury on this deal. You need to make it a little larger if you can.

MR. BYARS: Okay.

[66] THE COURT: Maybe if you'd take your glasses off you would be in the same shape the rest of us are. No. You're doing a good job. Didn't mean to be critical.

Q Did you meet the objective in 1996, your sales objective?

A No.

Q Did Volvo let you know if you didn't meet that objective?

A Yeah, I believe so.

Q Okay. Let me refer you to Plaintiff's Exhibit No. 16. What is Plaintiff's 16?

A It's a letter dated April 28th, 1997, to Mr. David Reeder from a Mr. Patterson, Executive Vice President.

THE COURT: Any objection?

MR. WILLIAMS: No, Your Honor; no objection.

THE COURT: Be admitted without objection as 16.

Q And this letter states, "Dear David; Each year Volvo GM Heavy Truck Corporation performs a review of its dealers. During the review we consider factors that we judge key to determining how successful our dealers are in maintaining their commitments to their contracts and agreements with Volvo GM Heavy Truck. For example, Dealer Sales and Service Agreement Annual Marketing and Business Plan, VED Addendum, VN Commitment and Agreement, et cetera."

THE COURT: Mr. Byars, don't read quite so fast –

MR. BYARS: All right.

THE COURT: – or my court reporter is going to get [67] after me.

Q Skipping down, it says "attached you will find a summary of our review of your 1996 performance. The results of this review necessitates our issuing a one-year Probationary Status Addendum to your Dealer Sales and

Service Agreement beginning March 31, 1997. In addition, a deficiency cure schedule has been included which defines acceptable levels of performance which must be met in order to receive a Standard Term Addendum for your Dealer Sales and Service Agreement. Failure to meet these levels of performance by March 31, 1998, may force us to seek remedies available to us under the terms and conditions of the Sales and Service Agreement." Is that what the letter says?

A That page, yes, sir.

Q And now attached to this letter was a Probationary Term Addendum, is that correct?

A Yes.

Q And it shows the effective date March 31, 1997, and the expiration date of March 31, 1998, is that correct?

A That's right.

THE COURT: Mr. Byars, is that all a part of Exhibit 16?

MR. BYARS: Yes, Your Honor.

THE COURT: Okay. Fine.

Q Now, let me ask you this: For 1995, although you did not meet your sales objective, did you receive any kind of a letter [68] like this putting you on any kind of a probation for not meeting your objective in 1995?

A No.

Q Was this the first kind of letter that you had ever received in your business, the heavy truck sales, where

you were given some type of Term Addendum and I guess a warning for failure to meet performance levels?

MR. WILLIAMS: Your Honor, he's gone beyond leading, now to testifying. This is a little bit much, I do think.

THE COURT: Yeah, try not to lead.

Q Is this the first time you received a letter like this?

A Yes, sir.

Q This was dated in April of 1997, is that right?

A The cover letter was the end of April 1997.

Q All right. Who was it that signed this Probationary Term Addendum?

A The Addendum itself, that's Stan Boris's signature, Director of Distribution and Dealer Development.

Q If you – for 1995, you were given a term of a contract to the year 2000 under the agreement, correct?

A Yes, March 31st, 2000.

Q What was your understanding of when the agreement would expire based on this letter?

A March 31st of 1998.

Q And what were your conclusions at the time you received this [69] letter?

A You know, we didn't understand. Probation we didn't think applied to this, but we were a little confused and we started to try to find out exactly what was this, what was it?

Q Now, let me have you take a look at Exhibit No. 17. What is that?

A That's a letter dated April 30, 1997. April 30th, 19 – to all dealer principals and it's from Stan Boris, Director of Distribution and Dealer Development.

MR. BYARS: All right. Your Honor, we would move for the admission of Plaintiff's Exhibit No. 17?

MR. WILLIAMS: No objection.

THE COURT: Be admitted without objection.

Q Now, what does this letter say?

A It says, reminds us that they issued the agreement in April of 1995 and then in the middle paragraph it says there have been requests from dealers for more clarity and definition concerning the rights and obligations of both parties to this agreement and as a result, we have decided to allow the current agreement to expire according to its terms on March 31st, 2000, and that they would work on a new agreement.

Q And this letter was just a couple days before you received your probationary term.

A Was it before or just after?

Q I believe it was just after, wasn't it?

[70] A I think it's after.

Q So what were your thoughts at that time?

A You know, we were trying to get somebody to tell us how long our franchise lasted and what's going on.

Q Did you ever receive a satisfactory explanation for this 1996 evaluation?

MR. WILLIAMS: Your Honor, I object. He's leading. I ask you to strike a satisfactory explanation.

THE COURT: Well, strike the term satisfactory explanation. Did you ever receive an explanation?

Q Did you ever receive an explanation for your 96 evaluation?

A No, sir.

Q I'm going to look back here at this Plaintiff's Exhibit No. 16. Third page of the Exhibit. What did they have down – what did Volvo have down for your actual sales for 1996?

A 25.

Q What did your records reflect?

A 66.

Q Did that cause you some concern that they only had you down for 25 sales?

A Yes.

Q And did you seek to have that corrected?

A Yes.

Q How was it that you recorded your sales for 1996?

A Our sales I recorded by our financial statement.

[71] Q All right. And those sales are recorded or they hit the books when you deliver trucks to your customer?

A Yes.

Q Okay.

A For most, most cases.

Q Who did you deal with in trying to get that 25 number corrected to the right amount?

A As I best remember, it was primarily Barbara Rosetti. I believe it was Barbara Rosetti from Greensboro.

Q Now, let me have you take a look at Exhibit No. 25.

A Yes.

Q What is Exhibit 25?

A That is another one of these electronic memos from the Volvo memo system.

MR. BYARS: All right. Your Honor, I move for the admission of Plaintiff's Exhibit 25?

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted without objection as 25.

Q This letter states, Bill, you must think I have abandoned you. I just realized this morning that you had not picked up my memos telling you that I was still working on the issues and when I called last week you were unavailable. I'm sorry for the mixup. I've gone through the records in detail to determine the differences between your sales count and ours. First we consider [72] a truck retailed when it is warranty registered. In reviewing the

records I noted that some 34 trucks for Transamerica business were warranty registered between December 21 and December 29, 95. Says you may have held these sales on your books until 96, but we consider them 1995 sales. I did, however, find an additional 11 trucks warranty registered in 1996, which were erroneously counted in 1995. I have included them in your 1996 retail number which will bring that up to 36 or 40 percent of your objective, still below acceptable levels.

Q In looking at your current numbers, I see that you have already retailed some 66 trucks this year and have an additional 12 on the order board. This looks like you will have no problem in meeting the minimum criteria set out for you in truck sales. I've also rechecked the V E D number and found that you had indeed sold one V E D engine; however, one engine against a target of 20 is only 5 percent of your achievement objective, is that correct?

A Yes.

Q Did you agree with the per count of 34?

A No.

THE COURT: What's this date on that memo?

Q That's dated June 24th of 1997. Let me have you look at Plaintiff's Exhibit No. 19. Is this a letter that was directed to Reeder-Simco by Russ Tedder, Regional Vice President for Volvo, and Dwight McAlexander?

[73] A Yes, it's a letter to David Reeder dated May 27th, 1997.

Q And that's after the letter from Stan Boris talking about the fact that no dealer in 95 had received a Term

Addendum and that the expiration would be in 2000. So now you received this on May 27th?

THE COURT: Let's – before you put it up, let's see if there's an objection. Do you have an objection to 19?

MR. WILLIAMS: Your Honor, not to No. 19. Just to counsel's continued leading of the witness, I do object to that.

THE COURT: Well, I'm going to sustain the leading and I'm going to admit 19. Go ahead, sir.

Q On this letter you received from Mr. Tedder, what do they have down for your sales?

A They still have 25. This letter actually pre-dates or this letter comes after the message from Barbara Rosetti which was exhibit 25 that's dated May 23rd.

Q All right. The print date on that was what I referred to earlier, but the memo from Miss Rosetti actually came out when?

A May 23rd, 1997.

Q All right. So this came after her correction to 34?

A Yes.

Q And it says in the past we normally scheduled meetings between you and the field managers to review your performance. This year, however, we do not want to detract from the time the field people are spending trying to transact business. What did [74] that indicate to you?

A Just what it says, that the field people don't have time to go over this with us.

Q Well, were you looking for an explanation, though, for your 1996 evaluation?

A Yes. We keep getting these different versions, you know, in a short span of time.

Q Now, take a look at Exhibit No. 32.

A Yes, sir.

Q Is that a letter you received from Barbara Rosetti in August of 97?

A Yes. It's dated August 12th, 1997, to me.

MR. BYARS: Your Honor, we move for the admission of Plaintiff's Exhibit No. 32.

THE COURT: Objection?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted without objection.

Q So in August, Miss Rosetti has redone your dealer evaluation for 96 and she has increased the sales to 36 out of 89, is that right?

A That's right.

Q Did you receive yet an additional piece of correspondence concerning your 96 objectives?

A Well, yes, because I refused to sign that because it was in error.

[75] Q Okay. And let me direct your attention to Exhibit 36. Who is that from?

A That's a – that would have been faxed to me. It's from Mike Truta to Bill Heck, a fax dated I believe September 2nd, 1997.

Q All right. We move for the admission of Plaintiff's Exhibit 36.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted.

Q It says, Bill, as of today we have not received your 1996 dealer evaluation. Effective today until we receive the 1996 dealer evaluation, I will no longer be able to supply you with new truck C E. What is C E?

A Well, that's another word for concession.

Q All right. I will not be able to supply you with new truck C E, customer and dealer visits. So he says if you don't get this 96 evaluation form back, I'm not going to visit you.

A That was not my interpretation. My interpretation was that I could not bring customers or visit the factory for the purpose of selling trucks.

Q And then he says I urge you to please return the 1996 dealer evaluation. If there's something you disagree with, please note and return to us. Was the – did you receive yet another piece of correspondence concerning the 96 evaluation?

A Yes, sir.

[76] Q Let me direct your attention to Plaintiff's Exhibit No, 37. What is that?

A It's a letter from Russ Tedder to David Reeder dated September 4th, 1997.

MR. BYARS: Okay. Your Honor, we move for the admission of Plaintiff's 37?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted.

Q Says Dear Dave, attached is a copy of your 96 dealer evaluation. Although this was sent to you in May of this year, we have not received your signed copy returned. Please return this via fax to my attention as soon as possible. In the meantime we have no choice but to hold your concession requests. What were you doing at this time, Bill?

A I was working on a proposal for ABF Freight Systems.

Q All right. And attached to this letter of September 4 what was the sales that they had down for you?

A Still 25.

Q Did that cause you a little concern?

MR. WILLIAMS: Object to the leading, Your Honor.

MR. BYARS: What were your thoughts about that?

THE COURT: Sustained and then okay. How's that?

A By this time I didn't understand. One person says they have adjusted it to 26. I get a 25. I think it's 66, so nothing has changed.

[77] Q Did you have a discussion with Mr. Reeder about that?

A Yes, I did.

Q He faxed that on back reflecting that the sales were 66 that year?

A Yes. David and I had had a long discussion and we agreed that we needed to get this ABF bid out so we could possibly sell some trucks and we corrected it to what he believed the correct numbers to be and shipped it in as they had requested.

Q Okay. Now, if we look at this – if you utilize the true figures for 1996 of 66, where did you stand with regard to the other dealers in the nation?

A Well, you take 66 and divide it by 89. That's 74 percent. So we would be at a higher percent of objective than what the entire nation achieved and slightly below what the regional average was. We were between national and regional.

Q And so the national dealer average for meeting the objective was 70.7 shown here on Exhibit No. 37, right?

A That's correct.

Q So if you use your true sales of 66, you were – you had a higher percentage of meeting your objective than the remaining dealers?

A Yes.

Q What objectives were set by Volvo for you for 1997? I'll refer you to Exhibit No. 21. We move for the admission of Exhibit 21.

[78] THE COURT: Objection?

MR. WILLIAMS: Just one moment, Your Honor. (Pause) No objection.

THE COURT: Be admitted without objection.

Q A little bit different format. It says 1997 marketing and business plan.

Q And there are listed here near the bottom it says minimum 1997 Volvo Class 8 retail objective, is that right? Right here?

A Yes, it says 130.

Q And what was your parts purchase objective for 1997?

A It was, purchase objective was $625,765 based on vehicles in operation of 8,511.

Q That meant you had to purchase $625,000 worth of parts?

A Yes.

Q What had it been in prior years?

A I don't remember exactly. It was 250 or so.

Q All right. What did you – did you contest these objectives as set for you by Volvo?

A Yes.

Q How did you do that?

A As I recall, this one was presented to us by our district manager at the time who was Scott Manchester and I told him, you know, that the way things were, I couldn't achieve it. And I asked him what the vehicles in operation was based on and I believe he referred me to Miss Rosetti, but that's just my best [79] recollection.

Q All right. And did you actually look at the registrations, truck registrations in the area?

A Well, there was a process with Miss Rosetti where I think I called her and I said, well, show me the 8500. You know, maybe we're missing something, and then a series of correspondence ensued.

Q After your discussion, did Volvo reduce the sales objective from 130?

A Yes.

Q As to what?

A 110 as memory serves we.

Q All right. Let me refer you to Exhibit No. 39.

THE COURT: Holly, was the last one 21?

MS. PORTER: Yes, sir.

A Yes.

MR. BYARS: Your Honor, we move for the admission of exhibit 39.

MR. WILLIAMS: No objection.

THE COURT: Be admitted without objection.

Q Does this show your 97 objective is 110?

A Yes, it does on the second page.

Q So originally from 89 to 130, now from 89 to 110.

A Yes. Right.

Q And what were your actual sales in 1997?

[80] A 85.

Q Okay. With regard to the parts purchase objective, are you familiar with state law concerning the relationship between the dealer and manufacturer on objectives or purchase requirements?

A Yes. Every year you have to apply for an Arkansas motor vehicle license and when the license comes back to you annually, they send you a copy of the pertinent statutes and I would read those.

Q Okay. Did you have any problems with the parts purchase objective as it was provided to you in 1997?

A Yeah, in two, in two ways. It should be a parts sales objective and it should be reasonable.

Q All right. Okay. And you raised those issues with people at Volvo?

A Yes.

Q And this was the result of getting your sales objective decreased from 130 to 110?

A Yes. The 110 and I believe the parts purchase objective was lowered as well to 395,000.

THE COURT: From 625?

A From 625, I believe.

Q Now, did you receive some type of a letter from Volvo concerning your 1997 objectives? Let me refer you to Plaintiff's exhibit 44.

A Yes.

[81] MR. BYARS: Your Honor, we move for the admission of 44.

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: I made a note to the clerk. It's about – in connection with Exhibit 44, it's about 44-degrees in here. Do you think we –

MS. PORTER: Go ask?

THE COURT: – turn it off or turn it up or something? Is anyone else getting cold? It will be admitted without objection.

Q What is the date of this letter, Mr. Heck?

A It's dated March 13th, 1998, to Mr. David Reeder from Barbara Rosetti.

Q Okay. When was this in relation to the Marco Island meeting?

A Well, the letter was written approximately a week after.

Q It says enclosed you will find your 1997 probationary cure status as of December 31, 97.

A Yes.

Q As you will note, you were unable to meet the required achievement in relation to VED engines and parts purchases as outlined with the 1997 Deficiency Cure Schedule included in Chris Patterson's letter of April 28th. Due to these results we will maintain your probationary status during 1998. Enclosed you will [82] find two copies of the 1998 Deficiency Cure Schedule for the year outlining the achievement required by your dealership by December 31, 1998, to be removed from probation. And if you take a look at the next page – well, first of all, this letter doesn't mention anything about vehicle sales, does it? It's talking about the Volvo engine and parts purchase?

A It strictly talks about purchases. It talks about parts purchases and VED's.

Q What's wrong with that about having a parts purchase objective?

A It doesn't appear to comply with the –

MR. WILLIAMS: Your Honor, just a moment. May we approach the bench?

THE COURT: Yes, you may.

(The following proceedings were had at the Bench between Court and Counsel and out of the hearing of the jury:)

THE COURT: What's the –

MR. WILLIAMS: The objection is, Your Honor, I think he's eliciting a legal opinion. I think Mr. Heck is getting ready to testify in his opinion –

THE COURT: It violates –

MR. WILLIAMS: Yes; that's correct.

THE COURT: I was a little concerned about that when he got into it, but I think you can ask him what his concerns are, but I don't think he can state that in his opinion it violates a [83] certain Arkansas statute or something.

MR. WILLIAMS: Thank you, Your Honor.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Continue, Mr. Byars.

BY MR. BYARS:

Q If you look at this Probationary Cure Status, let me ask you, first of all, did anyone from Volvo ever explain to you what a Probationary Cure Status was?

A No.

Q Did you request an explanation?

A Yes. I was confused over the letter that said everybody goes through March 2000, because there's a lot of questions on how the franchise is, and we still get all of these letters.

Q With regard to the second page of this Exhibit, your 1997 objective shows 110. The required achievement by December 31 was listed as 77 and your actual sales were 85, is that right?

A Yes, and that matches our number as well.

Q And so you were, you were 110 percent of the required achievement, but you were on probation, placed on probation? Is that your understanding?

A That's what the cover letter said.

Q Right.

THE COURT: And what's the exhibit number of that, Mr. Byars?

[84] MR. BYARS: That was 44.

Q What were your heavy truck sales objectives for 1997, I'm sorry, 1998? Take a look at Exhibit 50.

MR. BYARS: Your Honor, I'll move for the admission of Plaintiff's Exhibit 50.

MR. WILLIAMS: Your Honor, we don't object to the document itself. Again, there are some scribblings on here that are not part of the document.

THE COURT: I'm going to admit it subject to explaining what the scribblings are.

Q Mr. Heck, if you would look at the fourth page of that Exhibit, I think it says at the bottom 202,124. Is that your notation?

A Yes, sir.

Q And you have circled net working capital requirement?

A Correct.

Q Is that a capital requirement Volvo requires Reeder-Simco to have?

A Yes, sir.

Q And you've drawn a circle around that. What was the purpose of your notation?

A Well, they're saying that the standard net working capital required is $800,000 and that ours actually is 531,032, so it would be another deficiency and I questioned that number.

Q Okay. You believe that you actually met the standard of the [85] $800,000 working capital?

A I believe our working capital was, depending upon the day, it's another Exhibit, so I can't bring it up now.

Q Well, let me refer you to Plaintiff's Exhibit No. 50-A. What is that Exhibit?

A That is a 1999 marketing and business plan, Volvo Trucks North America.

Q Okay. Is that the notations that describe what your working capital was?

A Yes.

MR. BYARS: Your Honor, we would move for the admission of Plaintiff's Exhibit No. 50-A?

THE COURT: Any objection?

MR. WILLIAMS: Just one moment, Your Honor, if I'm following counsel. (Pause) Yes, Your Honor, we object. This document, 50-A, seems to just contain Mr. Heck's own notes as to how much he thinks he's got. This is not a Volvo document. I mean it is a Volvo document, but, again, with his writing it appears.

MR. BYARS: Your Honor, I believe it would be a matter for examination.

THE COURT: Yeah. I'm going to admit it. You can cross examine and probably hear some testimony from Mr. Heck about it, so your objection is overruled.

Q Based on your notes, Mr. Heck, what was your – what was the [86] dealership working capital?

A Depending upon what dates you look at, we use a LIFO Inventory Adjustment and our actual working capital depending upon the date, is anywhere from $1,196,000 to $1,520,000.

MR. BYARS: All right. Back to your Exhibit 50, Your Honor, we move for the admission of Exhibit 50 with that explained.

THE COURT: It will be admitted.

Q Your retail sales objectives for heavy trucks in 1998 as assigned by Volvo was 78, is that correct?

A Yes. That's on this exhibit.

Q All right. What were your actual 1998 sales?

A 34.

Q 34?

A 34.

Q Take a look at Exhibit 50-A. Does that have your 1999 objectives as assigned by Volvo?

A Yes.

Q And there's a – we've got a cutout there for the hole, but where it says 1999 Volvo VN Retail Sales Objective, 60, and them 1999 Volvo VOC Truck Retail Sales Objective, 25.

A That's correct.

Q Would you explain that?

A Yes. The VN is a highway tractor and the VOC would be an abbreviation for a vocational truck. So our new truck sales [87] objective is 85.

Q All right. 85 in 1999?

A Right.

Q What were your actual sales in 1999?

A 18. 18.

Q 18. Mr. Heck, let me ask you this: After you signed the Franchise Agreement with Volvo in 1995, did you continue to provide bids to the same customers with whom you had previously sold?

A At a minimum.

Q All right. And what else did you do in your efforts to increase sales?

A In 1998 we had opened up the new facility for the benefit of Volvo and we had hired additional sales people with more focus on Volvo as opposed to any other brands that we carried. And we went out and contacted maybe some more customers that we had not been as powerful after before. We really put out an all-out effort to go out.

Q All right. How many trucks did you make concession quotes on in 1995?

A There was about 900. There's a chart for that.

Q Let me refer you to Exhibit 331. What is Exhibit 331?

A 331 is a summary of how many units were quoted based on fleet concession requests we were able to recover historically, you know, from the past.

* * *

[91] admit then 292, subject to the Court's prior rulings.

MR. BYARS: All right Thank you, Judge.

Q Bill, let me now show you what's been admitted as Plaintiff's Exhibit No. 331. Tell me what this is.

A That is the number of vehicles quoted by year, 1995 through 1999. It's totalled and then the average.

Q So these were trucks upon which you were on the business in those years?

A Yes, sir.

Q The numbers?

A Yes.

Q So for 95 we had 945?

A Correct.

Q 96 is 735?

A Right. Now, that's quotes. That's not sales. That's quotes. So –

Q Understand. We'll put quotes here.

A Yeah.

Q And then in 97, 947?

A Correct.

Q In 1998, 1452?

A Right.

Q 1999, 1327.

A Right.

Q And that's – this Exhibit 331, it also shows the average [92] number of quotes of trucks submitted by Reeder-Simco, is that correct?

A That's right.

THE COURT: Are those quotes to customers, potential customers?

A Those are the number of vehicles involved in the quotes, and they are potential customer sales. You're correct.

THE COURT: Go ahead, sir.

Q All right. You believe that your sales results were consistent with the number of trucks you were bidding on?

A Not at all; no, sir.

Q And what did – what do you believe to be the problem?

A I didn't have the availability of the same pricing levels that the other dealers had available to them.

Q All right. Let me show you what's been marked as Plaintiff's Exhibit No. 69. What is that document?

A Number 69 is a Volvo policy letter to advise the dealers of a policy of Volvo.

MR. BYARS: We move for the admission of Plaintiff's Exhibit 69, Your Honor?

THE COURT: Objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted without objection.

Q This policy here, it says it's the sales policy letter No. 1 from Volvo Trucks North America Dealer Network in October of 98. [93] And it says under the policy, the one we are concerned with, this is Volvo's policy, RSA. Now, what is the RSA?

A That's another name for concession. RSA stands for the words Retail Sales Assistance, okay, concession, CE.

Q RSA is provided as required to meet competitive situations. VTNA will provide RSA uniformly, as in the case of a specific customer transaction, irrespective of customer domicile, and in the same manner to all dealers, is that correct?

A Yes, sir.

Q So that's Volvo's policy statement. Do you have any problems with the policy statement as it is stated?

A Not at all.

Q What do you have a problem with with respect to the policy?

A It was not executed. We did not receive what that was described as.

Q What is your understanding of the general process Volvo uses in granting concessions?

A We've already gone over the fact that the dealer puts the deal together and sends in the requests, so it starts from the dealer to Volvo and then Volvo transmits it somehow to their District Sales Managers. And then I know now that they use a process involving something called a matrix where they have a Guideline that has approximately 567 model groupings down one side of the table and then a line grouping across the top like zero to three, you know, so on and so forth. And it allegedly [94] gives the field a limit on what they can approve without having further executive rulings.

Q Let me show an example of a matrix. Your Honor, I'm going to refer the witness to Plaintiff's Exhibit No. 97 and ask that that be admitted.

THE COURT: Any objection?

MR. WILLIAMS: Excuse me just a moment, Your Honor.

MR. BYARS: 97.

THE COURT: 97.

MR. WILLIAMS: 97. Can we approach the bench on this one, Your Honor?

THE COURT: Yes, you may.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. WILLIAMS: Your Honor, we don't have any objection to the document as such, but you see it's marked confidential and under the terms of our Protective Order, I think its supposed to be, if submitted in court, then put under seal and we just want the appropriate protection for that.

THE COURT: We will do that. You need to – Miss Porter needs to be involved in that and we'll try to handle it different from any other.

MR. WILLIAMS: Okay. Thank you Your Honor.

MR. BYARS: Thank you.

(The following proceedings were had within the presence and [95] hearing of the jury:)

THE COURT: We had an incident last year where on a Friday afternoon we had a – had the fire alarm go off about 3:30 and everyone had gone home, and apparently they control the fire alarm from Little Rock, so it finally went off. I think it burned out. Exhibit 97 will be admitted.

MR. BYARS: Thank you, Your Honor.

Q Mr. Heck, give the jury an explanation of your understanding of this document.

MR. WILLIAMS: Your Honor, I'm sorry. I don't object to its admissibility, but I don't know that this witness has a foundation to testify concerning the document.

THE COURT: Well, he's – I'm going to say he does. I think he can give his opinion and express an opinion of the Plaintiff in this matter. It directly impacts him and I believe that he's qualified.

MR. WILLIAMS: I understand, but he said he did not get it until discovery, as I understood it.

BY MR. BYARS:

Q What is your understanding of what this is, Mr. Heck?

A This is what is termed a matrix and those listed down the left side, for example, on the third line, it says VNL 420 and VNL 610, those are the VN, over-the-road models with the different, you know, little sleeper, middle-sized sleeper, reading across, it gives a 17 percent, 19 percent, 21 percent, [96] 23 percent depending upon the quantity range up above where it will say like stock one-two, you can read those numbers, and then the numbers change very slightly by the models. You can see that. You know, in the one and two not so much, but then over at 26, there's a range of 17 percent on a W A up at the top to 23 percent on those auto cars and W G, so that is what was explained to us and what I understand to be a matrix. There was some foundation or beginning of how the District Sales Managers were advised by the Regional Vice Presidents of what their limit of authority was.

Q And what is your understanding of how this matrix process worked in practice?

A In practice, a District Sales Manager was able to use his judgment as to whether to give a dealer anywhere from 0 percent to 17 percent as in the case of the top row

column or like the VNL 420, 610 on a 20-truck deal, they could give up to 21 percent. See how it goes across and then from 10 to 25, but the District Manager, again, he could go anywhere from zero to 21 based upon his opinion of the situation, and, in fact, he could also at his decision level, he could ask that that number be approved at a higher level than 21. That was at his discretion.

Q Was that process fair in your mind?

A No.

Q Why not?

A Well, we end up with different dealers getting different [97] levels of concession based on either their District Manager having more knowledge or less knowledge of the deal they're on or another District Manager in adjacent or further away in part of the country could be bidding on similar transactions as to what you are and the one district manager might just have a different opinion of what he's able to give out to get that deal. He might have a bigger appetite to sell that order than another one, you know, that's, that's – understand that's my complaint.

Q When you first began working with Reeder-Simco, who was the manufacturer you worked with in the retail sale of heavy trucks?

A GMC Trucks and Coach Division.

Q How did the Volvo concession process differ from the GM methodology of granting the discounts?

A The difference is the district – the equivalent to the District Sales Manager at GM does not have an impact on these numbers. The numbers are approved from a

centralized location without regard to what dealer's requesting the deal.

Q Bill, who was your District Sales Manager or DSM during the timeframe here from 1997 into 2000?

A Mike TrutA

Q All right. Tell me what was your expectation as to what you felt your District Sales Manager ought to do?

A I thought several things. He should be aware of our objectives. He should be counseling us on how to obtain those objectives. He should be driven to obtain those objectives just [98] as much as I. He should work with our salesmen as required. He should help train the new people as his time allows. He should keep us abreast of these policy letters that have come up and make sure we understand them and apply them accurately, and various sales programs. He would be our source of sales support, you know, as it would develop.

Q How often did Mike Truta visit Reeder-Simco?

A Three or four times a year.

Q Did you have access to Mr. Truta's itinerary?

A Mr. Truta was sending his itinerary out weekly on the Volvo memo system to reduce the phone calls that go to the wrong place. In other words, once you knew where he was, you could call the dealership where he was located.

Q All right.

A So, yes, I was aware.

Q Did he – did he post his itinerary? Have you looked at where he posts his itinerary?

A Well, he sends it to us on the memo system.

Q All right. And where did Mr. Truta spend most of his time?

A Just my impression, most of his time was spent in Kansas City, Missouri.

Q And what's there?

A Westfall GMC Volvo.

THE COURT: Where was his office? Where was he based out of in the time he was your District Manager?

[99] A He lived in somewhere in the Kansas City area. Yes, sir.

Q Who was your Regional Vice President over your region from 1997 through 1999?

A Mr. Dez Fuller.

Q Did you attend the regular Volvo Regional Dealer Meetings?

A Yes.

Q Did you attend a regional dealer meeting in November of 1999?

A Yes, I did.

Q Was Dez Fuller at that meeting?

A Yes, he was.

Q Did you ask some questions during that meeting?

A Yes.

Q What did you ask – well, first of all, tell me who was in attendance at the meeting?

A Well, there were dealers from the Southwest Region. There was, as I recall, Joe Chastain, who was the head of Volvo Dealer Council at the time and from Volvo there was Dez Fuller. He was there being the Regional Vice President, and Chris Patterson was there, Executive Vice President, and Bob Wright. He's in charge of sales reports to Chris Patterson. Off the top of my head, I don't remember his title. But he's the top sales guy that reports to Chris Patterson.

Q All right. And who did you ask your question of at that meeting?

[100] A Well, the questions were being taken by Mr. Patterson and I asked Mr. Patterson if Volvo was going to continue their practice of micro-managing every deal that we were on to where we had to continue to request concession through this cumbersome process even for one truck. To sell one truck we have to go through this process and I didn't understand why we had to do that.

Q All right. And what response was made to your question?

A Mr. Wright fielded the question and he told me that Volvo would continue this process because it was necessary to protect their gross profit.

Q All right. Did Dez Fuller say anything in response to that question?

A Yeah. He stood up and he said, yeah, looking at me he says, yeah, I guess I am more stingy than others.

Q What did you understand that to mean in the context of the meeting?

A In line with what I already asked, that part of, part of the concession result was that for some reason Mr. Fuller was indicating to me that he gave out less concession to me than other either dealers in the region or other dealers in the country from other regional vice presidents.

Q Can you give me an example, and I'm asking about a comparison here of where this process has affected the business of Reeder-Simco?

A Sure.

[101] Q Let's take one, if we have time, Your Honor. Let me refer you to Exhibit 198. Are you there?

A Yes.

Q What is Exhibit No. 198?

A 198 is a special price confirmation, again, the form that we fill out to receive concession over and beyond the normal dealer price for a potential transaction.

Q And who was the potential customer on this deal?

A This was for Hiland Dairy Company.

Q All right.

MR. BYARS: Your Honor, I'll move for the admission of Plaintiff's Exhibit No. 198.

THE COURT: Any objection?

MR. WILLIAMS: Nothing, Your Honor, no additional objection other than those previously stated.

THE COURT: It will be admitted.

Q You said that your customer was Hiland Dairy Company?

A That's right.

Q Could you explain who Hiland Dairy is and how you came in contact with this customer?

A Well, Hiland Dairy is in the dairy business. If you go to Wal-mart Stores and buy some chip dip or milk or dairy products, it's most likely Hiland Dairy, so they are in the dairy business and they operate these trucks as what we call a private carrier. They don't hire out to other people. They just pull their own [102] loads around. And Hiland Dairy, their home office is in Springfield, Missouri, but they are domiciled in Ft. Smith as well. They have a location here, and we provide repair parts and body shop services to that location, and that's how we developed the business relationship with Hiland Dairy.

Q Did Hiland Dairy request you to make a bid for the sale of some trucks?

A Yes, sir.

Q And when was that?

A It was immediately prior to this July 21st pricing confirmation.

Q And how many trucks were they interested in purchasing?

A Twelve.

Q Okay. What was the model that you were bidding, what model truck?

A The model number was a VNL 64 T which is a VN day cab.

Q And what was the amount of concession that you requested for this potential sale?

A 12 percent is what I asked for.

Q All right. And what concession amount were you authorized to receive?

A 7.5 percent.

Q And who authorized that amount on the concession?

A Mike Truta.

Q And did you make a bid to Hiland Dairy based on that [103] concession approval?

A Yes, I did.

Q And what was the response?

A At first the customer was very receptive.

MR. WILLIAMS: Your Honor? To the degree Mr. Heck is now trying to characterize what the customer's response would be, that is clearly hearsay.

THE COURT: Yeah, I'm going to sustain that.

MR. WILLIAMS: Move to strike the last answer.

THE COURT: I will sustain the objection.

Q Take a look at Exhibit No. 199 and 199-A Let's first address Exhibit 199. What – just tell me briefly what is Exhibit 199?

A 199 is a vehicle invoice for a tractor sold to Hiland Dairy by Southwest Missouri Truck Center.

Q And that's another Volvo dealer?

A Yes, sir.

Q And where are they located?

A Springfield, Missouri.

Q All right. Your Honor, we would move for the admission of Plaintiff's Exhibit No. 199.

THE COURT: Any objection?

MR. WILLIAMS: No, Your Honor; no objection.

THE COURT: It may be admitted without objection.

Q So this is a what? This is the information that's contained [104] on the invoice to this dealer, is that right?

A It should – yes, it is. It is.

Q All right. Now, there's some information here it says sold to Southwest Missouri Truck Center, Hiland Dairy, Inc., and then we have what's called a postmark date of August 21, 1999, is that right?

A That's correct.

Q And what again does the postmark date represent?

A That's when the Order was received by Volvo for scheduling.

Q Okay. And if you compare the date that this dealer ordered these trucks, how close – how much time passed between your request for concession and the order by this other dealer?

A Approximately 30 days.

Q And this invoice indicates that that's for model 2000 VNL 64 T day cab, is that correct?

A That is correct.

Q And is that the same year model that you had requested a concession on?

A Yes. They're both 2000 model vehicles.

Q And, if you look on the invoice to the Missouri dealer, the price indicated for that chassis is 57,597, is that correct?

A That's dealer net, that's correct, for the base model.

Q And the amount on your comparison was 57,596?

A That's correct.

Q So we're a dollar off there, is that correct?

[105] A Yeah.

Q Now, the options which you had on your concession request was $9,283.

A That's right.

Q And on the Missouri dealer the options are listed at 9,282.

A Right. That's that missing dollar.

Q Now, the concession amount received by this dealer is shown Ion these lines, is that correct?

A That's right.

Q So this dealer got an 8.5 percent concession.

A That's right.

Q And does this invoice indicate that this dealer actually made sales to Hiland Dairy?

A It would indicate that he ordered them for them.

Q All right. And what does that tell you?

A He made the sale.

Q Now, take a look at Exhibit No. 199-A, and we move for the admission of that.

MR. WILLIAMS: I'm sorry. What was the number?

THE COURT: 199-A

MR. WILLIAMS: 199-A?

THE COURT: Don't show it quite yet, Mr. Byars. He's not expressed an opinion yet.

MR. WILLIAMS: No objection.

THE COURT: Now you may show it. Be admitted without [106] objection.

BY MR. BYARS:

Q Mr. Heck, does this document reflect the number of units ordered by the Missouri dealer on its sale to Hiland Dairy?

A Yes, it does. It reflects 12, 12 units.

Q In this case did Reeder-Simco miss a sale?

A Yes.

Q Did Volvo miss sale?

A No.

Q I'm going to have to go back and have you look. We need to get your 2000 objectives up there. Let me have you take a look at – I'm sorry, Your Honor.

THE COURT: That's okay. I think when you think we are at a stopping point, Mr. Byars, we may quit for the evening.

MR. BYARS: That's fine, if you desire, Judge. I just lost my place on the Exhibit that I was going to show.

THE COURT: Maybe I'll give you about 12 hours to find it then. Ladies and gentlemen of the jury, we are going to break for the evening. It's straight up 5:00 o'clock. When you get home, your spouse or significant other is going to want to know what that case is all aabout and tell me all you know and you simply must not discuss it. Tell them that later in the week that after they take you to dinner or fix dinner or whatever, you will tell them more than they ever want to know about this case, but it's absolutely imperative that you not discuss it with [107] anyone or allow anyone to discuss it with you. We are

going to remain in session until you're out. You can also leave your juror buttons here and you can also leave your juror notes in the jury room. The jury room will be open about 8:00 o'clock and we will have coffee and juice and hopefully some doughnuts that are less fat than what we had this morning, but that may not happen. Anyone have a problem being here at 9:00? Why don't we do that, and, Miss Porter, would you like for us to all go with you to the – well, and we wish you – we are sorry we kept you so late, but we hope the payroll works out, so let's remain in session until the jury is out of the room. Thank you very much. Have a good evening and I'll see you at 9:00 o'clock in the morning.

(Jury leaves the courtroom. The following proceedings were had outside of the presence and hearing of the jury:)

THE COURT: Let's let the record reflect it's now 5:02 and the jury is out of the room. Is there anything anybody wants to put on the record with the jury out of the room?

MR. WILLIAMS: Your Honor, I just might want to comment on the record on some of the things like we have just gotten into, they really are subject to the Court's ruling in limine this morning, and I don't want to –

THE COURT: I understand.

MR. WILLIAMS: – overly burden the record by coming to the bench every time we do have a – if we might have the record reflect, just agree to doing what we call the non-sales [108] continuing objection.

THE COURT: Well, I'll give you a continuing objection, but if you think that you need at any point to

make an objection in addition to the Motion in Limine and whatever, you certainly can.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: I think you can leave everything where it is. If there's something that is highly confidential or something, you may want to cover it up, but our cleaning crew does a magnificent job, but they do not mind avoiding us when we request it. So I think we can probably tell them that they probably need to stay out of the room. Anything else anyone can think of, Mr. Byars?

MR. BYARS: No, Your Honor.

THE COURT: We'll be in recess then till 9:00 o'clock in the morning. I'll be here from about 8:00 o'clock on, if you all think there's anything we need to put on the record, if you'll get the other side and locate the court reporter, we'll put it on. Thank you very much and have a good evening. (Off the record at this time.)

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THE COURT: Morning. Have a good evening? Miss Porter, did we get the checks out? Good. Good. I'll bet you're [109] the heroine of that whole group, are you not? We'll have the same rule as yesterday. We'll probably take a break at mid-morning, but if you need to take one before then, just give me a signal or a sign of some sort. Mr. Heck, you want to resume your place on the witness stand, please, sir. I'd remind you also that you're still under oath, sir.

A Yes, sir.

MR. BYARS: May I proceed, Your Honor?

THE COURT: Yes, sir, please, do.

BY MR. BYARS:

Q Mr. Heck, I'm going to show you what was previously admitted as Plaintiff's Exhibit No. 199. What is this document?

A That's an invoice to the Springfield, Missouri, dealer for trucks sold to Hiland Dairy.

Q All right. We talked about this yesterday. And I wanted to ask you, I meant to ask you what was the final net price charged by Volvo to Southwest Missouri Truck Center as a result of the 8.5 percent concession?

A Is this 318 we are looking at, Joe?

Q No. This is 199. I've got that up on the screen here.

A Oh, I was looking for it.

Q The second page of the invoice. What is that right there?

A Line 44 on that document is the amount of money that the dealer would actually pay for the truck at the time of the invoice.

[110] Q So that takes into account the concession of 8.5 percent?

A It includes that discount as well as freight.

Q All right. And what would be the final net price offered by Volvo to Reeder-Simco for the same vehicles with the 7.5 percent concession?

A It would be our dealer net multiplied by the 7.5.

Q So what is that number?

A Well, I need to find our dealer net, Joe. (Pause) Joe, I need to see how much the freight was at the time, please. It would be up higher on that piece of paper.

Q It's on 199?

A Yes. Or it's on my worksheet. We have them both.

Q Let me show you what's been marked as Plaintiff's Exhibit 198-B. Can you identify that document?

A Yes, sir. This is a worksheet prepared for the quotation to Hiland Dairy.

Q All right. Let me see that, please. Your Honor, we move for the admission of Exhibit 198-B.

THE COURT: Any objection?

MR. WILLIAMS: No, Your Honor.

THE COURT: Be admitted without objection.

A Do you want me to describe what I'm doing as I do it? Do you want me to do it as an example or just have me give you the result?

Q I just need for you to give me what your final net price [111], would be.

A All right.

THE COURT: Is it not on the Exhibit?

MR. BYARS: I believe he's – Bill, why don't you explain how you've come to that calculation?

A Just put this exhibit up there, Joe. You take the dealer net price and you reduce it by the amount of the concession and then you add the freight back in and you add the floor plan expense that you anticipated and you come up with the cost.

Q All right.

A All right.

Q And what is that number?

A The comparable number is $63,632.69.

Q I'm sorry. Would you repeat that?

A $63,632.69.

Q All right. So that's the difference in price that's compared to the 62,890 charged to the other, the other Volvo dealer?

A That's the comparison of the same number to the same number.

Q All right. And what did you figure your profit would be on that sale to Hiland Dairy?

A 3.69 percent or $2501.

Q All right. And you were contemplating 12 trucks in the transaction?

A That's correct.

[112] Q And so had you obtained that sale, what would your total lost profit on that sale be?

A Had we obtained it, we would have realized a gross profit of $30,000.

Q Let me refer you to Exhibit No. 318. First of all, let me ask you a couple more questions about that comparison we just did. Were the specs on the vehicle the same?

A Yes.

Q Was the quantity the same?

A Yes.

Q What about the trade information; were there any trades involved?

A There were no trades.

Q Was it – was there financing or cash as one of these variables?

A It was cash.

Q Was there any over allowance involved?

A There were no trades, so there was no over allowance.

Q What about the pricing strategy of the competition?

A It was identical. It was the same bid at the same time and place and time.

Q What about the timing of the transaction?

A It was at the same time. It was bid at the same time.

Q Were there any special delivery requirements that varied from the delivery requirements for the other Volvo dealer?

[113] A No. We were operating within the same timeframe. We could both get trucks in the same timeframe.

Q Was this an existing or a Conquest account?

A It was an existing account for both of us. It was not to me, but it was to the customer.

Q The customer had previously purchased Volvos?

A I'm sorry. That's what I was trying to say.

Q All right. What about extended warranties? Was there any difference in your bid and the other Volvo dealer's bid?

A No, sir.

Q Any vendor funds involved in this transaction?

A None.

Q What about customer credit worthiness? Is there any variability there between your bid and the Hiland Dairy bid?

A Same customer.

Q Now, let me refer you to Exhibit 318 – first of all, tell me what 318 is.

A 318 is a factory invoice for Hiland Dairy to Southwest Missouri Truck Center in Springfield, Missouri.

Q And, Your Honor, we move for the admission of Plaintiff's 318.

THE COURT: Any objection?

MR. WILLIAMS: Just a moment, Your Honor. Let me get that book. Okay? No objection, Your Honor.

THE COURT: It will be admitted.

[114] BY MR. BYARS:

Q This is another invoice, Southwest Missouri Truck Center for sale to Hiland Dairy. And when were these trucks – when was this truck ordered?

A The postmark date is on line 17 and it shows January 20th, 2000.

Q All right. And the postmark date on the first order of the 12 trucks was?

A Line 17, August 21st, 1999.

Q All right. What is this? What does this invoice represent?

A In our terminology, it would be what is termed an add-on order. The customer has placed an order for trucks, in this case 12, and for whatever reason they elected to extend the order. The factory accepted a single unit order in addition to the original 12, and with concession and price protection allowed the invoice price to actually be slightly less than the previous order.

Q All right. Take a look at Exhibit 318-A.

A Yes, sir.

Q What is that document?

A That is the result of a spread sheet that shows what the dealer net was and the concession amount and the, and the – in dollars, and the concession amount in percentage on that single unit order, shows it was postmarked January 20th. The bill date is March 8, 2000.

[115] MR. BYARS: Your Honor, we move for the admission of Exhibit 318-A?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: It will be admitted without objection.

Q So this reflects that there was just one additional truck ordered at a later time by Southwest Missouri Truck Center?

A Yes. And I believe it reflects that the concession discount was slightly higher.

Q All right. And the concession amount was higher. On 318, the total dealer cost due was 62,652. That's for the add-on truck to the other Volvo dealer, is that right?

A If that's line 44? Yeah, that one is 62,652.

Q Right there?

A Yes.

Q You see that? And for the 12-truck order, the dealer cost due to the other Volvo dealer was?

A 62,890. That's what I'm saying, the resulting price was slightly less.

Q Okay.

A Two hundred dollars or so.

Q All right. Who was the salesman on the Hiland Dairy transaction?

A Tony Hobbs.

Q And was this new potential business for you?

A In the sales area of our business it was. It was an ongoing [116] customer in our parts and service and body shop operation.

Q All right. And this was after you moved the Volvo section over to the new, the new corner?

A Correct. And Tony was one of the salesmen that I had brought on to concentrate more on this type of business and I was assisting him in his bid on this to teach him.

Q All right. Well, during this period of time, what was going on with your old accounts, your older established accounts where you've had a history of sales?

A I was still maintaining some of the larger accounts in the area, which you would tend to call house accounts which are my accounts, but I was seeing that there were some other problems along with all of these other things going on in 1998. Like I was having what appeared to me to be competition from the manufacturer for the attention of these customers.

Q All right. You ever heard of the term direct sale?

A Yes. I believe we had reference to that in a letter in this timeframe.

Q Okay. Let me have you look at Plaintiff's Exhibit No. 62. Can you tell me what this is, please?

A This is a letter dated January 22nd, 1998, from Steven J. Larkin to all U.S. Volvo dealer principals.

Q All right. So when did you receive this letter?

A Shortly after the date on the letter.

Q All right. So January 98, how does that bear in

* * *

[123] purchased approximately 60 units over the past five years since 1996. ABF has not purchased any Volvo products within the last five years. While I appreciate and have considered your views, based on the accounts' activity, Volvo Truck remains firm in its original position that ABF will remain a national account. As for TSL, based on the information provided, we will treat this customer as a dealer account. We will continue to solicit parts and service opportunities from national accounts through the local dealer to further support our mutual benefits. Signed Steven Larkin with a copy to Stan Boris. Did Mr. Larkin address the question you had of what was meant by going on a direct basis?

A No, sir. I didn't read it in that letter.

Q The 60 trucks referred to by Mr. Larkin in the letter, what was that?

A First, the 60 trucks I now know were trucks sold by Volvo directly to TSL, but at the time of this letter –

MR. WILLIAMS: Excuse me, Your Honor. I hate to interrupt, but, Your Honor, may we approach the bench

on an issue regarding this testimony, this particular line of testimony and this question?

THE COURT: Yes.

MR. WILLIAMS: Thank you, Your Honor.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

[124] MR. WILLIAMS: Mr. Byars is inquiring about a 92 sale to TSL. That's clearly barred by –

MR. SHANNON: 96 direct sale.

MR. WILLIAMS: 96 direct sale. I'm sorry. That's barred by the Statute of Limitations. We think if they are going to go into it, it's only for background, and we would be entitled to a limiting instruction on this question.

THE COURT: You're shaking your head. Is that a yes, you agree?

MR. BYARS: I don't mind a limiting instruction.

THE COURT: Which –

MR. BYARS: I think the one with reference to the fact this is a franchise –

THE COURT: I have one of them which I'm calling Limited Instruction A where the Statute of Limitations has unquestionably run on both, and then the other one I'm calling Instruction B, Limited Instruction B, if it's over three years and within four years.

MR. BYARS: Uh-huh.

THE COURT: Is it A or B?

MR. BYARS: It would be I believe A. Could I take a look?

THE COURT: Yes, sir.

MR. BYARS: This says really –

MR. SHANNON: We have – it doesn't fit either one of [125] them, Your Honor. I'm sorry. It doesn't fit either one of them, Your Honor. This is a direct sale that was actually barred by your ruling that primary line discrimination is –

THE COURT: You know, the ruling had to do with, you know, primary sales and the issue of damages and whatever. I think it can go to good faith.

MR. SHANNON: Certainly. Certainly. I understand that. I'm just saying that it doesn't –

MR. BYARS: This addresses price discrimination. I think the instruction should read that this evidence relates to the issue of liability under the Franchise Practices Act, but cannot be considered for purpose of assessing damages.

MR. SHANNON: I don't think it should even be, Your Honor. It should be considered for liability, maybe background at best, but liability –

MR. WILLIAMS: Liability is three years.

MR. SHANNON: Liability is three years as well.

MR. WILLIAMS: February of 1997 is what –

THE COURT: Well, I understand, but bad faith I think that may go to damages, but I think I may allow other testimony concerning the bad faith over the life of

this. What are you saying? What instruction do you want me to give, what limiting instruction? The evidence you're about to hear what, concerns –

MR. WILLIAMS: I can't – I don't have it in front of me, Your Honor. I'm sorry. Mr. Byars looked at it and I didn't. [126] I apologize.

MR. BYARS: I believe it would concern information relating to the claim asserted by Reeder-Simco under the Arkansas Franchise Practices Act, but may not be considered for the purposes of assessing damages.

MR. WILLIAMS: Your Honor, actually I think your B is closer to what we need.

THE COURT: I think it is B.

MR. BYARS: Yeah.

THE COURT: Have you got an Exhibit you're going to put in with it or just this testimony?

MR. BYARS: Testimony.

THE COURT: You're going to get to this testimony now. You want me to give the instruction now?

MR. BYARS: I don't care.

THE COURT: All right.

MR. WILLIAMS: Well, he was already in the process of talking

THE COURT: I think he was. Okay.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Ladies and gentlemen of the jury, because of the evidence that you were beginning to hear and I submit will hear, I'm going to give you what's known as a limited instruction. You may consider that evidence only on the issue of [127] Defendant's bad faith and their failure to deal with the Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim under the Arkansas Franchise Practices Act This evidence that you're going to hear and have heard may not be considered for establishing the amount of damages or as evidence of price discrimination or for any other purpose. Go ahead, sir.

Q Mr. Heck, you remember my question?

A Would you restate it so I –

Q All right.

A No, I don't.

Q The 60-truck sale referred to by Mr. Larkin, what was that?

A The 60-truck sale is a direct sale by Volvo to Trans-States Lines.

Q All right. Had Reeder-Simco previously sold trucks to TSL?

A Previously.

Q What happened to that, that sales relationship?

A That was alluded to in – that was stated in our letter to Mr. Boris. We stated that Volvo came in there and, and kind of damaged our relationship with that customer.

Q How did they do that?

A Specifically we had 120 trucks on order for TSL. There was a new president at TSL named Carl Peters. While the 120 trucks were on order, Mr. Broadmeadow came into our office and suggested that we switch the order –

MR. WILLIAMS: Excuse me. I apologize for objecting or [128] interjecting again, Your Honor, but this is another issue I think we need to approach the bench on and I apologize.

THE COURT: Who's Mr. Broadmeyer?

A Mr. Broadmeadow.

THE COURT: Broadmeadow?

A He's a national accounts representative that at that time –

THE COURT: Let's approach the bench, please.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. WILLIAMS: Your Honor, this is an incident which occurred in 1992. Now, if anything ought to be barred, I mean there has to be some reasonable limit on how far back the Plaintiffs can go in trying to prove background. I really think this is –

THE COURT: I thought we were up to 96 or something.

MR. SHANNON: Backed up.

MR. WILLIAMS: He's backed up. He's back up to 92 now. This is ancient history, Your Honor. I think this should not be allowed and we object to it.

THE COURT: Are you telling me the sale was pending for four years?

MR. BYARS: Well, here's the problem. Where you have a representative of Volvo going in and suggesting to someone they could just simply buy direct, that lasts forever for the customer. Why would they ever go through the dealer? You know, [129] that's been mentioned. Then there's a sale in 1996 that's direct.

MR. WILLIAMS: Apart from the limitations, I think there also serious hearsay problems here since apparently Mr. Heck is talking about a meeting that occurred between Mr. Broadmeadow and TSL representatives that he didn't attend.

THE COURT: I'm going to sustain it on the basis of the hearsay then. You know, I think otherwise it very well could be relevant to the overall deal, but . . .

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Off the record.

(Off the record at this time.)

THE COURT: Go ahead, Mr. Byars.

BY MR. BYARS:

Q Mr. Heck, who is Mr. Broadmeadow?

A Mr. Broadmeadow is currently I believe a National Accounts representative, and at various times in his past

he has been a National Accounts Representative and some form of a Regional Manager for the Southwest Region.

Q Was he a National Accounts Manager for Volvo at the time of his discussion you alluded to?

A I believe so.

Q Where did that discussion take place?

A In our dealership. We had 120 trucks on order.

[130] THE COURT: Were you present when this discussion was held?

A Yes, sir.

THE COURT: Fine.

Q All right. You had 120 trucks on order with TSL?

A We had 120 trucks on order. We had delivered 40. We were is the process of delivering the Order. The balance of the order was not coming through as scheduled. These orders have to be placed exactly so that you can do the trade-ins correctly and everything works. All right? The schedule was coming apart. We were trying to find out why. And the answer was that there had been conversation between TSL and –

MR. WILLIAMS: Your Honor, objection.

THE COURT: And I'm sustaining that. Unless you were present, unless you've heard –

A I don't know the rules. I'm sorry.

THE COURT: Well, unless you were present, you can't relate what a conversation was, unless you heard

it. That's called the hearsay exception, and I've sustained the objection. Yes, sir. Let's move on, sir.

A Mr. Broadmeadow said –

THE COURT: I don't want you to argue with me. I want you to answer the questions and only answer the questions that's been asked.

A Yes, sir.

[131] Q There was a Volvo dealership in Springdale, wasn't there?

A Yes, sir.

Q Who got the balance of that order?

A We did.

Q All right. What had happened with respect to the Springdale dealership?

A Well, they took over the sales of TSL after that transaction.

Q All right. Did Mr. Broadmeadow have anything to do with the transfer of that business to the Springdale dealership?

MR. WILLIAMS: Objection; lack of foundation.

THE COURT: Yeah. You're going to have to rephrase the question. I'm going to sustain that, but I think you can rephrase it and it may be appropriate.

Q Did Mr. Broadmeadow tell you that in your meeting with him –

MR. WILLIAMS: Objection, Your Honor, to leading.

THE COURT: Now, that's permissible. Go ahead, sir. I'm overruling that.

BY MR. BYARS:

Q Did Mr. Broadmeadow make a statement to you in your meeting concerning a suggestion that Springdale take over the business?

A Yes.

Q Now, this Exhibit 66, you wrote to Stan back in 63 when you were raising this issue about this national accounts matter. You [132] wrote to Stanley Boris, although this letter was written by Mr. Larkin.

A That's correct.

Q Why was that?

A Stan Boris, of the two people, Stan Boris was the one that we had met, that we knew face-to-face, and he was also involved in this other process that was ongoing with these probationary letters.

Q Okay. So you had met Mr. Boris?

A Yes, sir.

Q Under what circumstances did you meet Mr. Boris?

A He came to our dealership.

Q All right. When did he come to your dealership?

A I know he came to our dealership in February of 1998.

Q All right. All right. Do you recall meeting with Boris where there was a discussion concerning any desire of Reeder-Simco to – or some kind of suggestion that Reeder-Simco sell its –

MR. WILLIAMS: Your Honor, may we approach the bench again?

THE COURT: Yes.

(The following proceedings were had at the Bench between Court and counsel and outside of the hearing of the jury:)

MR. WILLIAMS: I believe the testimony is in the proof of a deposition that this meeting occurred. He didn't recall,

* * *

[134] THE COURT: You're going to have to bring yours. You need to bring your instruction.

MR. WILLIAMS: I apologize.

THE COURT: That's all right.

MR. WILLIAMS: Your Honor, I think it would be B. It would be B. I mean it's a position I'll take up with the Court when the jury is out of the room.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: I need to give you – repeat that limited instruction I gave you just a few moments ago. The

evidence that you are hearing and are going to hear may be considered by you only on the issues of the Defendant's bad faith in their failure to deal with the Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim under the Arkansas Franchise Practices Act. It may not be considered for establishing the amount of damages or as evidence of price discrimination or for any other purpose. You may go ahead.

MR. BYARS: Thank you, Your Honor.

BY MR. BYARS:

Q Mr. Heck, what was the discussion with Mr. Boris about?

A I told Mr. Boris that we were were not interested in selling our dealership to MHC in Kansas City, Missouri.

Q Who brought this up?

A Mr. Boris.

[135] Q Did you ever obtain any type of an offer?

A No, sir.

Q I'm going to refer you now – we need to talk about the 2000 objectives set by Volvo for Reeder-Simco, and I'm going to refer you to Exhibit No. 290. Let me just show it to you here. What is 290?

A It's a letter dated February 6, 2001, to all Midwest Regional Volvo Truck Dealers from Jack Conahan, Vice President Midwest Region.

Q All right. And contained with that Exhibit 290 there was an attachment, is that right?

A Yes, sir.

Q And what was the attachment?

A The attachment was a Review of Performance and a Statement of Objectives. It's another format of, you know, kind of like what we were looking at yesterday, business objectives, Portfolio of Criteria, but it's not labeled the same I don't think.

MR. BYARS: Your Honor, I move for the admission of Plaintiff's 290.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: It will be admitted.

BY MR. BYARS:

Q Let me first take a look at this content of the cover Letter. It says to all Midwest Region Volvo Truck Dealers. What region had you been in prior to this?

[136] A Prior to this letter we were in the Southwest Region for a time.

Q Okay. What happened to the Southwest Region?

A It was closed.

Q Okay. And what happened to all the dealers who were in the Southwest Region?

A They were split up to other regions.

Q All right. And you landed in the Midwest Region?

A Yes, sir.

Q All right. Were you later in another region?

A We are now in the Southeast Region.

Q Okay. Let me take – direct your attention to this paragraph in Exhibit 290, says the number one issue in the region remains getting on to business. Regionally we remain in the business position of quoting only one-third of the business. Of that, we win one-third of the business and that equals our market share. You see that?

A Yes, sir.

Q It says our challenge this year is to review the remaining two-thirds of the business we aren't quoting and select half of those customers for quotes this year. Our target is to quote two-thirds of the total business in your AOR. There certainly is no shortage of the information to do this. Please contact your DSM if you need help with Polk or other market information. And the 2000 objectives are attached.

[137] A It's down towards the bottom, Joe.

Q I'm sorry.

A Right there. Go – yeah. See it says the 2000 retail sale goal?

Q Is that your retail sales goal right there, 60?

A Yes.

Q How about that? Does that indicate the retail sales objectives for 2000?

A Yes.

Q Does that mean 60 units?

A Yes.

Q What were your actual sales in number of units in 2000?

A I believe our records reflect eight.

THE COURT: Did you say eight?

A I said eight.

Q Now, what's your understanding with reference to winning one-third of the business? Is that talking about – how does that relate to the number of quotes that you had issued during this timeframe? What is your understanding of that?

A If I compare our sales experience over this period of time to the amount of units I was quoting on our results we're nowhere near a third –

Q All right.

A – you know, much less than a third.

Q What kind of sales would you have if you had gotten a third [138] of these trucks you quoted on in 97?

A We are starting – just tell me what number you're starting with. 947?

Q Yes.

A 312.

Q What if you got a third of the 1452?

A 479.

Q If you had gotten a third of the 1327?

A 437.

Q These are units?

A Correct.

Q How many Volvo Trucks did you sell to ABF after you filed this lawsuit?

A That's reflected in that chart. That order intake reflects 500 orders from ABF.

Q 500 units?

A Correct.

Q How many units did you sell in 1992?

A 200 – 276 or so. We would have to go and look it up just to be sure. 272.

Q 272?

A Yes.

Q Let me direct your attention now to some comparisons of your actual sales in comparison to sales made by Volvo to other dealers. We look, first of all, to Exhibit 132.

[139] THE COURT: Mr. Byars, are you going to have a series of these?

MR. BYARS: Yes, Your Honor.

THE COURT: Okay. Does anyone want – we can take a break now or we can do one in about 30 minutes. Anybody want to take one now? Why don't you go ahead, then, sir.

MR. BYARS: All right. What is Exhibit 132?

A That's a factory invoice for a Volvo tractor.

Q And it's to who?

A To Reeder-Simco.

Q All right. And, Your Honor, we move for the admission of Plaintiff's Exhibit 132.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted.

Q What was the model – who was this sale – who was the customer on this sale?

A The customer that ordered it, it was Lane Freight, a subsidiary of Link America, and we would have to look to actually see who bought the truck.

Q What kind of a transaction was this?

A It ended up being a financing lease, I believe. Some of them were cash from the customers, some were finance leases in which case the customer would be the finance lease company.

Q Well, this transaction involves a sale of trucks first to Reeder-Simco, is that correct?

[140] A That's correct.

Q And we are going to be comparing that to a sale by Volvo to another Volvo dealer?

A Yes.

Q But the end user is referenced on the invoice as Lane Freight System?

A Right.

Q But title was taken by various leasing companies, wasn't it?

A That's correct.

Q And they were located in various locations?

A Right.

Q All right. What model truck are we looking at here?

A A 1999 VNL 64 T. These are 420 sleepers, but at that particular time it was not included in the model number.

Q All right. And the dealer net on the chassis, what is the chassis? What are we referring to when we say the chassis?

A That's the base model. If you ordered no options whatsoever and just ordered one standard truck, you would get that truck as it was equipped, and it would cost the dealer $56,238 without further discounts.

Q And what's the total cost of the options on this?

A Dealer cost is $10,871.

Q And what amount of concession were you granted on this deal?

A 9 percent.

Q Let me back up a little bit and ask you how was your – how [141] was your contact made with this particular customer?

A I contacted this customer in Tulsa, Oklahoma.

Q All right. And what was the customer interested in purchasing?

A He was interested in trucks for one of their subsidiaries is Houston that pulled extremely long trailers. So that's why we used the short sleeper and he wanted some day cabs for some of his other operations, non-sleepers.

Q Did you make arrangements for the financing?

A Yes, sir.

Q That wasn't one of Volvo's obligations or concerns on this deal, was it?

A No, sir.

Q You received a nine percent concession?

A Yes.

Q When did you obtain that concession percentage? What was the process involved here?

A Well, it started in January and it proceeded through February and March, and I think we finalized the concession in larch, but we probably have an Exhibit.

Q Okay.

A I mean there's five or six pages.

MR. BYARS: Your Honor, I'm going to refer to Exhibit No. 134. This has been provided to the counsel. I move for the admission of Exhibit 134.

[142] THE COURT: Let's let them find it.

MR. WILLIAMS: Yes, Your Honor. No objection.

THE COURT: Be admitted without objection.

Q Exhibit 134 includes various forms for this concession request. Okay? And I would like to quickly just go through what the process was in getting your concession on this deal.

A Okay. Now, this particular form is for an add-on request for this customer. This is after we – excuse me?

Q Up here we're looking at 50, 60?

A It's not 134?

Q This is one – well, there are a number of pages in 134.

A I'm sorry. I'll just watch what's on the TV set.

Q Yes. Just tell the jury how this process started in requesting your concession on this transaction.

A Well, the customer was in the need of evaluating how many trucks he could afford and the process of getting rid of trucks he had, so he had to know a transaction price and a monthly cost, so he could do his budgeting and we started out, we would want to start out with the price of the truck, and I would contact my finance sources and find out what the monthly payment would be, so we were looking at different volume levels and resulting prices, and these quotations, as I recall, started – well, this one reflects something done in probably February. I can't see the date on top of it, the way you've got it.

Q All right.

[143] A But you send it in. You know, the 12.51, this particular one sticks in my mind because earlier we had been quoting the trucks based on a different pricing base, and pricing base refers to when the data book was published.

When they want to change pricing, they put a new data book out. So the previous one had a very high list price, but the concessions were very high. So they decided to lower their list prices which would allow them to lower the concessions, and so less money would be involved in having to sell these trucks. Instead of having to get back, you know, say $20,000, you could only get back 8,000, and it came out the same.

Q Now, I think you're actually referring to – this is February of 98. You're talking about the start here.

A Right. That's what I'm saying. That request –

Q This request was 26 percent?

A Right. And the request that you had up there was the one to get the same amount of money for that same deal under the new rule. That was the difference between those two slides.

Q Okay. So January of 98 you've got 50 or 60 trucks there requesting 26 percent.

A That's right.

Q And then in February of 98 you've got 12.51 percent to adjust for the price change?

A Yes. The old deal number was U538101, and the replacement deal under the new pricing rules would be V426101.

[144] Q So the 12.51 percent would give you the same dealer net price as your previous request for the 26 percent?

A That's right.

Q All right. And then – and then what happened next with the customer?

A Well, we did the – we got the concession back and it wasn't 12 and a half percent is what I recall next.

Q Okay.

A The customer had indicated interest at those figures.

Q All right. And so what – now, was there a change in the the numbers of trucks to be ordered?

A Yes. Eventually, once we knew what the prices were going to be, he decided to order 20 of the sleeper cabs and initially four of the day cabs, and then later raised it to six day cabs.

Q All right. And what is this, what does this document reflect?

A That's a further evolution in this process of going back and forth, and it shows different option content on – see the one is a 420, the first column, the next one is a 610, then a 420, and then a 610. Those are or's. In other words, would sell 20 of these or, or, or and you notice the models, the first two columns are VNM's, which is a short cab, and the next ones are VNL's which is a long cab, which would – it's different. You can see it.

Q What information did you provide to Volvo on this quote?

[145] A I gave them some background on what the customer is and son sales history; that the fleet size was such and such, the primary make they had, the engine manufacturer they were quoting and so on, when they

were going to take the bid, who the competition was on the deal, that there were no trades, and overall probability I rated it as a seven out of a ten. In other words, I was that confident that if I got the numbers I asked for, I could get the deal.

Q All right. And –

A And it's out of my area –

Q The potential fleet size on this matter was 180, they had 180 fleet vehicles in their fleet?

A At that time.

Q Why is that important?

A Well, that's one of the factors –

Q All right.

A – I believe.

Q All right. And so you first requested 12-point or 26 percent, then the 12.51 percent. And now you're at 10 percent.

A Yes.

Q And then what does this document reflect here in March of 98?

A That reflects when the, when the back and forth with the factories was over with – when all of that negotiation is out of [146] the way, and we really know what we're going to do, I wanted to confirm what it took to do the numbers that the customer was agreeing to. You know, the customer, I had given them prices and everybody's happy and that's basically what it took to confirm that.

Q Okay. And you needed 10 percent on the VNM 64 T day cabs?

A Right.

Q And 8.4 percent on the VNL 40 T 420's?

A That's right.

Q But what did you get?

A I believe I got nine percent across the board.

Q And how did that affect the deal?

A Well, it gave me a little more profit, you know, a little bit more on the sleeper cabs than what I had anticipated and it took most of my – well, it took profit away from the day cab side.

Q All right. And what did the customer decide to do?

A He decided to order more of the day cabs. He bought six of them.

Q So you wound up with nine percent on that transaction and how many trucks were involved on that deal?

A We sold 20 of the 420's and six of the day cabs.

Q Okay. When did you actually order these trucks?

A That would be the postmark date on line 17. That's April 13th, 1998.

[147] Q All right. Now, let's talk about the 20-truck part of this transaction. If you'd look at Exhibit 132-A?

A Yes, sir.

Q Who took title in these vehicles?

A We transferred title to General Electric Capital Corporation.

Q And that was the lessor on the transaction?

A That's correct.

Q With Lane Freight as the lessee?

A That's right.

Q So –

A You want to put that on the screen?

Q Sure. What is – I'm sorry. Let me first request the admission of 132-A

MR. WILLIAMS: No objection, Your Honor.

THE COURT: It will be admitted.

Q What is Exhibit 132-A?

A That is our retail invoice to the customer so we can get paid.

Q All right. And when do you submit your retail invoice to the customer?

A Most commonly immediately prior to delivery. In other words, you know, we get the money and the truck goes out.

Q All right. And this was General Electric Capital Corporation was in Tulsa, Oklahoma? I'm sorry.

[148] A No.

Q Was that – All right.

A That's the registration address.

Q Where was General Electric Capital Corporation?

A The person I dealt with was in Van Buren. The corporation itself at the time was in Boston, I believe.

Q All right. On this Lane Freight transaction, when these trucks were delivered o you, were they shipped from Greensboro, North Carolina to Ft. Smith, Arkansas?

A Yes.

Q And then were those trucks – where were those trucks actually delivered?

A Reeder-Simco delivered these trucks to Houston, Texas, these particular trucks.

Q Okay. Now, let's take a look at Exhibit 133. What is Exhibit 133?

A This is a factory invoice to a dealer.

Q Okay. A factory invoice to another Volvo dealer, is that correct?

A Right.

Q And what is the name of that dealer?

A Barrett Truck Center.

MR. BYARS: Your Honor, we move for the admission of plaintiff's Exhibit 133.

THE COURT: Any objection?

[149] MR. WILLIAMS: No, Your Honor.

THE COURT: Be admitted.

Q When in relationship to your order of the 20 trucks of the model VNL 64 T was this sale to the other Volvo dealer?

A The postmark date of the order was February 26th, 1998.

Q And yours was on April 13 of 98?

A That's correct.

Q All right. Now, let me show you – let's put these side by side here, if I could. Plaintiff's Exhibit 133 is the Barrett Truck Center, and right there where it has the model, the chassis price, and the option price, compare that to the Reeder-Simco –

A The. chassis price, which is the standard truck, is 56,238 in both cases, which indicates that the pricing level is the same.

Q All right.

A And the option pricing on the Barrett Truck Center comparison on 133, the option pricing is $10,773, and the option pricing on the trucks we sold were $10,871. So there is a hundred dollars difference between the two options out of 60 –

Q What does that tell you about these comparisons?

A They are valid comparisons.

Q Well, we have a functionally-equivalent truck –

A Yes.

Q – involved here?

A Sure.

Q Now, on Exhibit – let me have you look at Exhibit 133-A

[150] A Yes, sir.

Q What is that document?

A That's a spread sheet representing a transaction to Brookshire's Grocery.

Q Well, is this related to the same transaction to the Volvo sale at the Barrett Truck Center?

A Yes, it is, sir. The invoice we were looking at was the third truck.

MR. BYARS: Your Honor, we move for the admission of Exhibit 133-A

THE COURT: Objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted.

Q On these models, the VNL 64 T, what was the amount of the concession granted to this other Volvo dealer?

A 12.3 percent.

Q On the invoice that we received from Volvo regarding this, there is no concession amount listed on the front page of the invoice, is there?

A That's correct.

Q It's reflected on the back page of the invoice?

A Yes, sir.

Q And if we would take a concession adjustment of 8,242 to the dealer net price, that's 12.3 percent?

A Yes, sir.

[151] Q All right. Now, what was the actual dealer cost due to Barrett Truck Center on this truck? Is that right here? Listed on the invoice?

A Yes, 67,911.

Q All right. But that doesn't include the adjustment, does it?

A No.

Q The concession amount?

A Correct.

Q So subtract the 67,911 by the amount of the concession.

A It's 59,669.

Q 59,000?

A 669.

Q 669 was the net price or the total of the actual cost to this other dealer, is that right?

A That's correct.

Q Now, compare that to what your cost was.

A 62,275.

Q So what's the difference in the price charged to Reeder-Simco versus what this other dealer was able to obtain?

A Is that 62,275?

Q Yes.

A The difference is $2,606 each.

Q $2606. For your 20 trucks is the difference in price. You had to pay that much more than the other dealer?

[152] A Yes.

Q Now, multiply 2606 by 20 trucks. What is your result?

A $52,120.

Q 52,120?

A Correct.

Q For Lane Freight?

A That's correct.

Q Mr. Heck, were there any trades that complicated this deal to make your concession more difficult for Volvo?

A No, sir.

Q Was the financing a burden on Volvo?

A Not on Volvo.

Q It was financed through these leasing companies, wasn't it?

A Yes, sir.

Q Was there any over allowance involved to burden Volvo?

A No, there were no trades.

Q What about the timing of these transactions?

A They're contemporaneous.

Q Were there any special delivery requirements in this, in this matter?

A No.

Q In other words, Reeder-Simco did not request any kind of expedited delivery time for these trucks?

A No, sir.

Q Was this an existing or a Conquest account for you?

[153] A It was a Conquest account.

Q And what does that mean?

A A Conquest account is one that you've never sold before that you would like to develop a relationship with in itself.

Q All right.

A Never bought –

Q Your understanding from Volvo – how would that factor tend to apply to the concession amount?

A I would think it would give you more. That is my belief.

Q Any differences on the extended warranty of these transactions?

A No, sir.

Q Any difference in vendor funds on these transactions?

MR. WILLIAMS: Objection, Your Honor; lack of foundation.

THE COURT: It's overruled.

A We did receive vendor funds, but it did not affect the concession because it was a separate amount and it was not included. It was between Detroit Diesel and the customer and myself that paid for an option that was on the trucks.

Q All right. And what was that in particular?

A The dealer, the vendor funds were $486, and that offset the cost of the optimized idle which was a Detroit Diesel exclusive feature that Detroit Diesel wanted to get people to try out so they made it free.

[154] Q That does not relate to the concession amount, does it?

A No, sir.

MR. BYARS: Your Honor, we are about to look at another comparison.

THE COURT: Ladies and gentlemen of the jury, we're going to take – has anyone started smoking since yesterday?

JURORS: No.

THE COURT: We are going to take probably, probably a 15 or 20-minute break, and this may be the only break we have this morning. Why don't I give you 20 minutes? We'll be back at 20 till. Remember the prior admonitions of the Court not to discuss this with anyone or allow anyone to discuss it with you. If you go outside, be sure and wear your juror button, however. We are going to remain in session and seated until you're out of the room. Have a nice break and we'll see you in 20 minutes.

(The following proceedings were had outside of the presence and hearing of the jury:)

THE COURT: Let the record reflect it's 10:21. The jury is out of the room. Anything anybody wants to put on the record with the jury out of the room?

MR. WILLIAMS: No, not right now, Your Honor.

THE COURT: Mr. Byars, how many more similar dealings or similar categories or –

MR. BYARS: That was one that took a little more time because of the different concession requests. We're going to be [155] able to go more quickly. I think we are going to have one – four more of the sales-to-sales comparisons.

THE COURT: My suggestion is, in an effort to expedite matters, why don't you kind of review those with the Defendant's attorneys, if you haven't already, and make sure they have got the Exhibit numbers and we may expedite it somewhat. You're doing fine. I'm not trying to have you go any faster than you should, but I think this is something that maybe can be expedited and a lot of the questions, too, that you ask, perhaps there may be some way – you may do it by agreement where we can have all

four of those transactions sort of in evidence and then ask the same general questions about all of them. But that's something you-all can work out. I had previously – we have got two limiting Instructions A and B. I think we agreed that those would be the instructions we would use. What I think you ought to do on the break, too, is see if you can find yours. If you can't, I'll make you new ones, and then number yours like mine, A and B, and then if you want limited instruction A, you simply say A, or if you want B, say B. I'll leave those with Miss Porter and you can do that during break. Have a nice break and I'll see you in about 16 minutes.

MR. BYARS: Judge, I need to – made a misstatement there. We've got four more on sales-to-sales, but then we'll have some that were non-sales comparisons.

THE COURT: I didn't get encouraged so . . .

[156] MR. BYARS: All right.

(Off the record at this time. The following proceedings were had within the presence and hearing of the jury:)

THE COURT: You-all have a good break? We'll probably go till about noon and then we'll go see if Trio's is open today. You also, we do have a lot of Exhibits in this case and they're being put on the big screen, but when you do go back to deliberate, all of these will be bundled up, put in order and taken back with you. We're hoping that the jury room is large enough. But the Exhibits you're going to have, and we'll get them all back to you. Go ahead, sir.

BY MR. BYARS:

Q Thank you, Your Honor. Mr. Heck, back on this Lane Freight deal, we need to finish that one up. Didn't you attempt to add on a few trucks on this 20 some odd truck deal for Lane Freight?

A Yes, sir.

Q And when did you do that?

A I made the request June 23rd to add on to the order to get additional orders or concession for additional orders.

Q And, that was within what timeframe of the initial order and delivery of those trucks approximately?

A It was right around 60 days I think. Would that be close enough?

Q All right. And you had gotten nine percent concession on the truck we compared?

[157] A Yes.

Q Let me show you what's been marked as and admitted as Plaintiff's Exhibit No. 134. What is this?

A That is the special price confirmation concession request for the add-on order as specified down in the comments.

Q Okay. So you were looking to add on four more trucks to this deal, the same model?

A They're the same truck.

Q Same truck and you requested your nine percent that you had got previously?

A Just keep everything the same.

Q What were you approved for?

A Seven percent.

Q What did the customer say when you went back to the customer?

MR. WILLIAMS: Objection, Your Honor.

THE COURT: I think that's probably relevant. I'm going to overrule it.

MR. WILLIAMS: I'm sorry, Your Honor?

THE COURT: I'm overruling it. I think he can answer that. Ask what the customer did. You can't say what he said.

MR. BYARS: Thank you, Judge.

Q First of all, let me ask you what did you have to do in light of not getting the nine percent?

A I had to raise my price, since I had not received the [158] concession I needed on this particular model before and my profit was already below $600. On this reduction concession, I would have lost money to sell them this truck, and I raised the price and he did not place this additional order for four trucks.

Q All right. You believe you would have gotten the order had you gotten the same concession you did before?

A Yes. It was to add four more trucks. to the order. It was already agreed to.

Q And what did you mention that your profit was figured out for the 20 you did sell?

A The 20 I sold?

Q Well, the –

A The six.

Q The per truck profit you had figured.

A On the six day cabs that we had already placed on order, our profit was between five and $600 per truck is my best recollection.

Q All right. And so your lost profit as a result of this transaction of the four trucks was four times what your prior profit was?

A Potentially $2,400, somewhere in that neighborhood.

Q But how did that bear with regard to the relationship with this customer that had 180 trucks in his fleet?

A It damaged our relationship.

Q Did you get any more orders from this customer?

[159] A No.

Q Now take a look at Exhibit 130.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Good. Be admitted without objection. See sometimes I don't have much of a role in this thing at all.

Q Exhibit 130 is an invoice to Reeder-Simco by Volvo for a sale to the City of Ft. Smith, isn't it?

A That's correct.

Q And when did you order these trucks?

A Postmark date is 2/10/97.

Q And what kind of truck were you selling to the City of Ft. Smith?

A A dump truck.

Q That's the model of a 1997 model WG 64?

A Right.

Q What was the concession amount that was granted to you by Volvo on this order?

A 19 percent.

Q All right. Now, look at the total dealer net 63,785, is that right?

A Yes, line 32.

Q And this was for the sale of two trucks, is that right?

A Yes.

Q As shown on Exhibit 130 and 130-A, and that consists of two pages and these are your – these were your retail invoices to [160] the City of Ft. Smith?

A That's correct. That was two truck orders.

Q All right. Now, take a look at what's been marked as Exhibit 131. Your Honor, we move for the admission of 131.

THE COURT: It will be admitted without objection.

Q This is an invoice from Volvo to Westfall Volvo for sale to Rapidway's Wallsworth, and what is the model?

A 1997 WG 64.

Q Same truck?

A Yes.

Q And what was the dealer net for this 63,736, which is very close to your dealer net?

A Within $50.

Q All right. Now, what we do with the dealer net is you reduce that by the concession, correct?

A That's right.

Q And you got 19 percent?

A Right.

Q What did this dealer get?

A 21 percent.

Q And if we compare the timeframe, this dealer got 21 percent December 17, 96 –

A Yes.

Q – in comparison to your order less than three months later on February 10, 97, is that right?

[161] A That's correct.

Q Now, when you ordered – you purchased these trucks from Volvo, right?

A Yes.

Q And Volvo makes these trucks where?

A At New River Valley, VirginiA

Q All right.

A NRV they call it.

Q So were those trucks shipped from the plant in Virginia to the City of – to Ft. Smith for delivery to your customer?

A Yes.

Q Take a look now at Exhibit 128.

MR. BYARS: Your Honor, we offer Exhibit 128.

MR. WILLIAMS: No objection to 128 or 129, Your Honor.

THE COURT: 128, 129.

MS. PORTER: What about 130-A he talked about?

THE COURT: Are you going to go back to 130-A? Was there some discussion of it or –

MR. BYARS: I don't believe so, not right now.

THE COURT: Okay.

MS. PORTER: 130-A

Q Exhibit 128 is an invoice from Volvo to Reeder-Simco for a sale to New-Hiway Express, isn't it?

A We resold the vehicle to New Hi-way Express.

Q Reeder-Simco purchased the trucks from Volvo?

[162] A Yes, sir.

Q We're going to compare that to another deal where a different dealer purchased trucks from Volvo, right?

A Yes.

Q How many trucks were involved in this transaction?

A For sale to New Hi-way Express was an 85-unit order.

Q Okay. And that's shown here on Exhibit 128-C, is that correct?

MR. BYARS: We offer Exhibit 128-C.

THE COURT: It will be admitted without objection.

MR. WILLIAMS: Your Honor, we think this is a, if I may say, an appropriate place for a Limiting Instruction A.

THE COURT: Okay. And I've lost Limited instruction No. A The evidence you're about to hear concerns instances of alleged price discrimination that occurred too long ago to be considered by you for any reason except on the issue of Defendant's bad faith.

MR. SHANNON: Just a minute. I'm sorry.

MR. WILLIAMS: We misspoke. I apologize to the Court for that. May we approach the bench on this just to clarify and hope we get this straightened out?

THE COURT: Yeah.

MR. BYARS: Yes, Your Honor. This transaction occurred in November of 1996 through –

THE COURT: I think, I think –

[163] MR. BYARS: – into July of 97.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. WILLIAMS: I apologize, Your Honor, we'll get straight on this. If it occurred in November of 96, it's barred under the Franchise Practices Act.

THE COURT: That's right, so, therefore, it ought to be under B then.

MR. BYARS: Well, Your Honor, these trucks – Volvo began invoicing Reeder-Simco December of 1996 and did not complete invoicing Reeder-Simco until June of 1997.

THE COURT: This is what the 80 trucks or the 85 trucks?

MR. BYARS: Yes.

MR. SHANNON: The price was set, you know, long before the 1296, you know, no change in the concession amount.

MR. WILLIAMS: Right.

MR. SHANNON: The postmark date for all of these trucks was the same prior to 12/96 and they started invoicing them prior to 12/96, so the fact that they may have finished the order, finished billing the trucks shouldn't bring this into the timeframe of the Franchise Practices Act.

MR. BYARS: Even though the price may have been set at an earlier date for this transaction, there was no damage until after the trucks were actually delivered. Volvo has admitted in [164] other evidence already admitted that they consider a sale to occur when the warranty registration occurs –

MR. WILLIAMS: I thought we had already – I'm sorry. Go ahead. I apologize.

MR. BYARS: In addition –

THE COURT: Well, from what I have, Mr. Byars, I'm going to admit it, but only admit it if I give instruction B here or limiting instruction B.

MR. BYARS: Right.

THE COURT: I think it is barred, at least part of it, by the Statute of Limitations.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: The evidence you're about to hear may be considered by you only on the issue of Defendant's bad faith and their failure to deal with Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim of the Arkansas Franchise Practices Act and may not be considered . . . I think I'm going to give A.

MR. SHANNON: We were discussing that, Your Honor. I don't know that either one of them are completely appropriate.

MR. BYARS: Could we approach, Your Honor?

THE COURT: Yes, you may. I have two Limiting Instructions, A and/or a B. And I may have to get a C it looks like.

[165] (The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. BYARS: These are sales-to-sales comparisons, four year statute on that.

THE COURT: I agree with you.

MR. SHANNON: Your Honor –

THE COURT: It's over three years and within four years.

MR. SHANNON: Right.

MR. BYARS: Yes.

THE COURT: All right. So I think it does go to Defendant's –

MR. SHANNON: The last sentence of B is what is the problem.

MR. WILLIAMS: Now it says down to I think A.

THE COURT: I think we can give B then without the last sentence.

MR. WILLIAMS: Your Honor, I think to be fair I think we probably do need a C. I think we need a C. That covers the situation here. You've got a claim –

THE COURT: I agree.

MR. WILLIAMS: – that is under the Robinson-Patman Act, but is barred under the Franchise Act. I don't think we have anything that addresses that.

THE COURT: I don't think we do either. (Pause) Guys, [166] I'm proposing a C to say the evidence you're about to hear may be considered by you on the issue of damages of price discrimination under federal law, but may not be considered on the issue of damages under the Arkansas Federal – or the Fair Franchise Practices Act. However, it may be considered on the issue of bad faith and on the failure to deal with the Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim under the Arkansas Franchise Practices Act.

MR. WILLIAMS: The last sentence dealing with the bad faith, Your Honor, if I'm understanding the Court's ruling is that it's relevant only on the issue of the background motive opportunity, and I have a concern that the jury is going to hear that it's relative on the issue of bad faith. That they're going to think it's a a predicate on which they can actually find liability.

THE COURT: I'm actually putting it is not to be considered for damages.

MR. WILLIAMS: Okay. Okay. I'm sorry. I just heard "it."

THE COURT: It may not be considered on the issue of damages under the Arkansas –

MR. WILLIAMS: Okay.

THE COURT: I'm going to do this as C. Do you-all want to think about this some more? You all want me to have it typed and look at it?

[167] MR. WILLIAMS: I would like to see it so we don't have to address it again, Your Honor, if possible.

THE COURT: Well, we can have it typed. Let me, Jody, Mr. Byars, don't leave just yet, but let me read it for you and after I read it, I'll have her go type it and circulate it. The evidence you're about to hear may be considered by you on the issue of damages of price discrimination under federal law, but may not be considered on the issue of damages under the Arkansas Franchise Practices Act. However, it may be considered on the issue of bad faith and on the failure to deal with Plaintiff in a commercially-reasonable manner in connection with Plaintiff's claim under the Arkansas Franchise Practices Act, and that's C.

MR. WILLIAMS: I think that's okay.

THE COURT: Any objection? Does that take care of it?

MR. SHANNON: Other than our other objections that it shouldn't be used even on that –

MR. WILLIAMS: Right, right.

THE COURT: I know you think we shouldn't be here at all.

MR. WILLIAMS: Just keeping our record, Your Honor.

THE COURT: Right.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: What I suspected was in fact the case. We now have a Limiting Instruction C. The evidence you're about to [168] hear may be considered by you on the issue of damages for price discrimination under federal law, but may not be considered on the issue of damages under the Arkansas Franchise Practices Act. However, it may be considered by you on the issue of bad faith and the failure to deal with the Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim under the Arkansas Franchise Practices Act. All right. Now you may proceed.

Q Mr. Heck, tell me what Plaintiff's Exhibit 128-C is.

A That's a spread sheet reflecting the trucks ordered by Reeder-Simco – well, part of the order for New Hi-way Express. This photo here is probably 81 trucks.

Q All right. At the third page of 128-C, that includes a different order number. Is that what you were referring to?

A Yes. And the fact that the concession amount is different.

Q Okay. With regard to the VNL 64 T 610's which were ordered by Reeder-Simco for sale, when did Volvo begin to invoice Reeder-Simco for the sale of these trucks?

A The invoice date on the first truck, which is serial number, 738633, the invoice date of that truck is December 10th, 1996.

Q All right. And what was the invoice date of the last truck in this same transaction?

A What started as the same transaction would be serial number 738713. That's Exhibit 128-A. And the invoice date on 738713 is June 18th, 1997.

[169] Q Okay. That's shown here on Exhibit 128-A as –

A Yes.

Q – June 18, 1997.

A Line eight.

Q Why is it that – let me ask you this: When are the trucks warranty registered?

A When they are placed in service.

Q All right. And they can't be placed in service until you receive delivery of the trucks, correct?

A Till I get them, sure, of course.

Q When do you invoice in relationship to the delivery date by Volvo?

A Prior to.

Q All right. Well, would your invoices to your customer reflect when these vehicles were warranty registered at or near that time?

A Yeah, yeah, within days I would expect.

Q All right. Let me refer you to Exhibit 128-B, and move for the admission of that Exhibit.

THE COURT: Any objection?

MR. WILLIAMS: No objection to the Exhibit, Your Honor.

THE COURT: Be admitted without objection.

Q On this transaction, Mr. Heck, did Reeder-Simco invoice the customer for the sale of trucks on this transaction as late as November 3 of 1997?

[170] A No.

Q Okay. Let me hand you these documents 128-B.

MR. WILLIAMS: 128-B, is that what you're using now?

MR. BYARS: Yes.

MR. WILLIAMS: Okay.

Q You need to ascertain from these documents when you last invoiced the customer for this transaction. Would you do that, please?

A You want to know when I last did it?

Q Yes.

A June 9th, 1997.

Q Okay. Thank you. All right. Let me show you again Exhibit 128-A. What type of truck was being sold here?

A A – I just want to get the model year straight. These are 1998 model VNL 64 T Volvo, VN's.

Q All right. And what was the amount of the concession you received on this transaction?

A 24.2.

THE COURT: Is this 128-A now we're on, Mr. Byars?

MR. BYARS: Yes, Your Honor.

THE COURT: Was that introduced?

MS. PORTER: No.

MR. BYARS: Yes.

THE COURT: It was not.

MS. PORTER: 128 was.

[171] A I think it's 128.

MR. BYARS: We move for the admission of 128.

MR. WILLIAMS: No objection to 128.

THE COURT: Or 128-A.

MR. WILLIAMS: Or 128-A.

THE COURT: Fine. They will both be admitted.

MR. BYARS: Thank you.

Q Now, let me direct your attention to Plaintiff's Exhibit 129. We move for the admission of 129.

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted without objection.

Q This is an invoice from Volvo to Ball Volvo and GMC Trucks for a sale – resale to Harold Dicky Transport, is that right?

A That's right.

Q And what type of trucks are being sold to that dealer?

A 1998 VNL 64 T VN Volvo's.

Q And what was the amount of the concession granted to this other Volvo dealer?

A 27.3 percent.

Q And you received 24.2 percent?

A That's correct.

Q Take a look at Plaintiff's Exhibit 129-A. We are ready for the admission of Exhibit 129-A.

MR. WILLIAMS: No objection.

[172] THE COURT: Be admitted without objection.

Q How many trucks did this other Volvo dealer purchase according to this Exhibit?

A Ten.

Q In comparison to your 80 truck deal?

A Yes.

Q Now, what was the total net cost to the other Volvo dealer as a result of that transaction or that concession amount? Is it shown here on Plaintiff's Exhibit 129 as 64,220?

A Yes, Line 43 of Exhibit 129.

Q And total dealer cost due on your sale was 25,280?

A No. Total dealer cost on ours?

Q Yes.

A 66,719.

Q That's shown on Plaintiff's Exhibit 128-A?

A 128-A, line number 43.

Q And that's the invoice reflecting the 25.2 percent concession on the chassis and 25.4 percent on the options?

A Correct.

Q Okay. What is the difference in your dealer cost and the dealer cost to the other Volvo dealer when theirs was 64,220?

A $2499 each.

Q So you paid that amount more than the other Volvo dealer?

A Correct, each.

Q All right, per unit. So what's the – if you multiply that [173] difference by the number of trucks you sold, what is the number?

A $192,423.

Q Let me direct your attention to Exhibit 124. We move for the admission of Exhibit 124?

MR. WILLIAMS: No.

THE COURT: Any objection?

MR. WILLIAMS: No objection, Your Honor.

MR. BYARS: Exhibit 124.

THE COURT: 124 will be admitted.

Q This is an invoice from Volvo to Reeder-Simco for the sale of what type of truck?

A 1997 WG64T.

Q All right. And what was the postmark date on that transaction?

A February 13th, 1996.

Q And what was the invoice date on that transaction?

A Line eight is April 17th, 1996.

Q What was the – look at Exhibit 124-B. We move for the admission of 124-B.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: It will be admitted.

Q What was the amount of your – of the concession granted to Reeder-Simco in that transaction?

A 13.27 percent.

Q That's on a three-truck deal?

[174] A Yes.

Q Now, take a look at Exhibit 125. Your Honor, we move for the admission of Exhibit 125.

MR. WILLIAMS: Your Honor, may I inquire? I think we are still under the limiting instruction C that was read earlier I think this applies as well.

THE COURT: All right.

MR. WILLIAMS: I don't know if it needs to be read, but I just want to note that for the record.

THE COURT: Fine. I'll be happy to read it again if you –

MR. WILLIAMS: No, I think maybe given it's a new instruction, the jury might appreciate hearing it again.

THE COURT: The evidence you're about to hear again may be considered by you on the issue of damages for price discrimination under federal law, but it may not be considered or the issue of damages under the Arkansas Franchise Practices Act. However, the evidence may be considered on the issue of Defendant's bad faith and their failure to deal with Plaintiff in a commercially-reasonable manner in connection with Plaintiff's claim under the Arkansas Franchise Practices Act. Proceed, please.

Q Exhibit 125. Has that been admitted?

THE COURT: Yes.

MR. BYARS: Okay.

[175] THE COURT: Yes. It will be admitted.

BY MR. BYARS:

Q Bill, this is an invoice from Volvo for another Volvo dealer, Westfall Volvo GMC Trucks in Kansas City, is that right?

A That's right.

Q And what type of truck is being sold here?

A A 1997 WG64T.

Q That's the same model number as the truck sold to Reeder-Simco?

A Yes, sir.

Q What was the – now, take a look at Exhibit 125-A.

A Yes.

MR. BYARS: Move for the admission of 125-A.

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted.

Q What does 125-A reflect?

A It reflects that it's a one-truck deal and it's a concession amount of 18.04 percent.

Q All right. And that 125-A relates to this sale by Westfall or from Volvo to Westfall for the City of Excelsior Springs?

A That's correct.

Q And that occurred in September of 1996, is that right?

A The postmark date is September.

Q September. Okay. And they received an 18.4 percent [176] concession, is that right?

A Correct.

Q The dealer cost, if you look at the second page of Plaintiff's Exhibit 125. As a result of that 18.4 percent

concession, the total due to that other Volvo dealer was or by that – the other dealer had to pay 44,803, is that right?

A That's right.

Q And how much did Reeder-Simco have to pay on that transaction?

A By comparison to 124, Sam Ludington?

Q Yes.

A 56,467.

Q And what's the difference between those two prices?

A $11,624.

Q There were two trucks sold, right?

A Two, Sam Ludington.

Q Yes, or was it three?

A I thought it was three. It is three.

Q All right.

A It's not two.

Q All right. Where is that – is that indicated on your invoices to the customer, Exhibit 124-A?

A 124-A reflects three invoices, detail invoices to Sam Ludington from Reeder-Simco for trucks.

MR. BYARS: All right. We move for the admission of [177] 124-A.

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted 124-A.

Q Three trucks were sold. If you do the math, what's three times the difference in the price?

A $34,872.

Q If I could direct your attention to Exhibit 126 and 126-A.

A Yes.

MR. BYARS: Your Honor, we move for the admission of those two exhibits.

THE COURT: Any objection to 126 and 126-A?

MR. WILLIAMS: No, Your Honor.

THE COURT: Admitted without objection.

Q Mr. Heck, this is other invoice by Volvo for a sale to a different Volvo dealer, Griffin Volvo Truck Center. Inc, for the same type of truck that we dealt with on your sale to Sam Ludington, is that correct?

A That's correct.

Q And take a look at Exhibit 126-A. What was the amount of concession granted to the other Volvo dealer –

A Fifteen-point –

Q – on a two truck transaction?

A 15.42 percent.

Q Greater concession than yours?

[178] A Yes.

Q And what was the postmark date of this sale or the invoice date by Volvo to Griffin Truck Center?

A Well, the postmark date is April 9th, 1996, and the invoice date would be line eight, is June 6th, 1996.

Q All right. And what were the dates of your sales?

A Postmark date was February 13th, 1996, and the invoice date was April 17th, 1996.

Q All right. And when you purchased these trucks from Volvo, were those trucks shipped from the plant in – I'm sorry – is it Virginia?

A It's in Virginia.

Q Were those trucks shipped from Virginia to Ft. Smith, Arkansas?

A Yes, sir.

Q For delivery to your customer?

A Yes.

Q And where were those delivered?

A Just a second. I don't remember. We delivered those to Wilburton, Oklahoma.

Q All right. Now, I need to ask you those same questions. I don't think I asked you that with respect to your sale to New Hi-way Express, the 80-truck transaction. Were the vehicles on that 80-truck transaction shipped from Virginia to Ft. Smith for delivery to your customer?

[179] A Yes, sir.

Q And where were those truck delivered by Reeder-Simco?

A Some to Arkansas, some to Oklahoma, some – they went to various places.

Q All right. Let me have you take a look at Exhibit 127. We move for the admission of Exhibit 127.

THE COURT: Any objection.

MR. BYARS: 127-A.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: 127 and 127-A are both admitted.

Q Exhibit 127 is a copy of an invoice from Volvo to another Volvo dealer, General Truck Sales and Service of Memphis, is that right?

A Yes.

Q And that's for a resale to Dalton Petroleum, is that correct?

A Yes, sir.

Q And what type of truck are we dealing with in that transaction?

A A 1996 WG64T.

Q All right. And what was the amount of the – if you look at Exhibit 127-A, what was the amount of concession that this other dealer received?

A 14.53 percent, one truck.

Q And that was a greater concession amount than your three-[180]truck transaction to Sam Ludington?

A Yes.

Q Take a look at Exhibit 121.

MR. BYARS: I move for the admission of Exhibit 121.

THE COURT: Any objection?

MR. WILLIAMS: Yes, Your Honor. We do object. We think this one is subject to a limiting instruction. We move this transaction would be subject to Limiting Instruction A.

THE COURT: Mr. Byars, you in agreement with that?

MR. BYARS: Just a moment, Your Honor.

THE COURT: What's the number of this one, Holly?

MS. PORTER: 121.

MR. BYARS: I believe that's correct, Your Honor.

THE COURT: Are you moving to admit 121 and 121-A?

MR. BYARS: Yes, Your Honor. And there's also 121-C.

THE COURT: Same objection to all of them?

MR. WILLIAMS: Yes, Your Honor; same objection.

THE COURT: The evidence you're about to hear concerning Exhibits 121, 121-A, and 121-C concern instances of alleged price discrimination that occurred too long ago to be considered by you for any reason except on the issue of Defendant's bad faith and their failure to deal with the Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim under the Arkansas Franchise Practices Act. It may not be considered for establishing the amount of [181] Plaintiff's damages or as any evidence of price discrimination under federal law or for any other purpose. Go ahead, sir. And I'm admitting it on that basis, those exhibits.

MR. BYARS: I'm sorry, Your Honor. On what – what instruction was that? Was that C?

THE COURT: A.

MR. BYARS: I disagree with that, Your Honor.

THE COURT: Why don't we approach the bench then?

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. BYARS: I'm sorry, Your Honor, but this transaction involves the sale to Reeder-Simco where the invoicing actually began January 24, 96, on the first truck.

THE COURT: Hang on one second.

MR. BYARS: But the invoice dates for the majority of the trucks fall on or after – well, there's one February 9, 1996, and then the rest of the trucks were not invoiced until February 15th, 1996, and after –

MR. SHANNON: They were ordered.

THE COURT: Well –

MR. SHANNON: I'm sorry.

THE COURT: Is one of them January 24th. Is that when they started? Is that what you said?

MR. BYARS: Yes, January 24, 1996, was the invoice date. These transactions were not completed and Reeder-Simco did [182] not invoice its customers until after –

THE COURT: Well, I'm going with the earlier invoice date, you know, and it was January 24th, and I've lost the notebook I had when this case was filed January 27th or 28th.

MR. WILLIAMS: February 9, and actually, Your Honor, it was postmarked, the date that Reeder-Simco submitted its Order was in November 95, November 17. We think that's the operative date for the limitations.

THE COURT: I think, therefore, under the Court's ruling, I think Limiting Instruction A is correct. I'll give you a objection and a continuing exception with reference, with reference to the Statute of Limitations. If we have others, it may may save us another trip up here.

MR. BYARS: Yes.

MR. WILLIAMS: The next one is the same, I believe is the same situation, falls in the same period.

THE COURT: I will give the Limiting Instruction A over your objection.

MR. BYARS: Yes, sir.

THE COURT: I'll do that at this time.

MR. WILLIAMS: Your Honor, as a housekeeping matter, would it be acceptable if we could put this on the ELMO so they could read along as you read it?

THE COURT: No. Let me read it. What I'll probably do is send it back with them.

[183] MR. BYARS: Fine. That's fine.

(The following proceedings were had within the presence and hearing of the jury:)

MR. BYARS: I believe 121-A, B and C have been admitted.

THE COURT: Yes, subject to the Limiting Instruction that was given.

MR. BYARS: Yes, Your Honor.

Q 121 is an invoice from Volvo to Reeder-Simco concerning the sale of model 1996 WIA 64 TTES, is that right?

A Yes.

Q And 121-C reflects that this involves the sale of how many trucks?

A Looks like it would be 20, without counting them all.

Q Okay. Do you recall a transaction involving 20, a 20-truck transaction to New Hi-way Express?

A Several. This is one of them.

Q All right. And what was the amount of the concession granted to Reeder-Simco on the sale of these trucks?

A 19.22.

MR. BYARS: Now, Your Honor, we move for the admission of Plaintiff's Exhibit 122 and 122-A.

MR. WILLIAMS: No objection, subject to the limiting instruction, Your Honor.

THE COURT: Yes, I would repeat then the same limiting [184] instruction that I gave you before. Go ahead, sir. Admitted on that basis.

Q Mr. Heck, Plaintiff's Exhibit 122 is a copy of an invoice from Volvo to Westfall Volvo for the sale of model 1996 WIA 64 TTES, is that correct?

A Yes, sir.

Q And if you look at Exhibit 122-A, how many trucks were involved in this transaction, five?

A Five.

Q So Westfall Volvo purchased five of these trucks from Volvo, and when was the postmark date on that transaction?

A June 21st. 1995.

Q And what was the amount of concession received by the other dealer?

A 23.73.

Q And that compares to the amount granted to Reeder-Simco of what?

A On this one 20-truck deal it was 19.22.

Q All right. Now, there is a difference I guess in the model number on, this truck, is that correct?

A Yes, there is.

Q One is a WIA 64 TES. One of them has an additional T in there?

A That's right. That is right.

Q Now, you've seen what we have referred to as matrix [185] documents in this case, is that right?

A Yes, I have.

MR. BYARS: Your Honor, I'm going to move for the admission of the matrix documents which have been marked as Plaintiff's Exhibit 93, 94, 95, 96, and 97.

THE COURT: Any objection?

MR. WILLIAMS: Your Honor, if I may have just a moment. Mr. Byars told me, but that's why I was not quick on the response. I'm sorry. Can you give me the numbers?

MR. BYARS: 93 through 97.

THE COURT: 93 through 97.

MS. PORTER: I already have 97 in.

MR. WILLIAMS: Your Honor, we don't object to the authenticity of the documents. We object to their relevance, because all of the documents that he's dealing with are 98 documents and this transaction is back several years before that.

THE COURT: I'm going to let you cross examine when the time presents itself, but they will be admitted as Exhibits 93 through 97.

Q Mr. Heck, would you look at those Exhibits? Those are what are considered to be matrix documents that we were able to obtain from Volvo.

A I'm not caught up yet. Ninety –

Q Just put one of them on the screen here.

A Ninety who? Six?

[186] Q You can see 96 here.

A Yes, I can.

Q With regard to the models, is there any distinction made between W I A T T E S and W I A T E S?

A Not on that chart.

Q On any of the matrix documents that you've been able to locate, is there any type of distinction made between those two models?

A I don't recall there being one.

Q Is the W A model a comparable model to the W I A?

A It depends upon what year to be honest with you.

Q All right. I believe there are a couple of other matrix documents that we will look at in a moment. I don't want to take up the time to do that right now. Let me direct your attention to Exhibit No. 117. We move for the admission, Your Honor, of Exhibits 117-A and B or 117-A and 117-B and Exhibits 118, 118-A, 119 and 119-A.

MR. WILLIAMS: Your Honor, we don't object to the documents. We previous – pursuant to our previous conference, we did request a limiting instruction A be given.

THE COURT: Okay. Fine. I'm going to admit Exhibits 117, 117-A, 117-B, 118, 118-A, 119, and 119-A subject to the following limiting instruction: The evidence you're going to hear on these exhibits concerns instances of price – alleged price discrimination that occurred too long ago to be considered by you [187] for any reason except on the issue of Defendant's bad faith and their failure to deal with the Plaintiff in a commercially reasonable manner in connection with Plaintiff's claim under the Arkansas Franchise Practices Act. It may not be considered for establishing the amount of Plaintiff's damages or as evidence of price discrimination under federal law or for any other purpose. On that basis, they're admitted. Go ahead, sir.

Q Bill, is Exhibit 117 a copy of the invoice from Volvo for a sale to Reeder-Simco?

A Yes, sir.

Q And that's for a 1996 model WIATES, is that correct?

A WIA 64 TES, that's right.

Q All right. And what was the postmark date of this transaction?

A August 17, 1995.

Q All right. And take a look at Exhibit 117-A, does that reflect the number of trucks that were in this deal sold by Reeder-Simco?

A Yes.

Q And over on the far right column there are invoice dates. Those would be the dates which Volvo invoiced Reeder-Simco, is that correct?

A That's right.

Q And Exhibit 117-B would reflect when Reeder-Simco invoiced its customer, is that right?

[188] A That's right.

Q And that was December 29, 1995?

A That's right.

Q And tell me about this customer. Where are they located, how did you make the contact?

A Distribution services is located, they're domiciled in Little Rock as well as Memphis, Tennessee. And the original contact was through an acquaintance of mine. And then I called on them in Little Rock. And they're –

Q In regard to this transaction, what concession amount was received by Reeder-Simco?

A 20.3.

Q All right. Let me have you look at Exhibit 118. This is an invoice from Volvo for the sale of a 1996 WIA 64 TES to the Volvo dealer, Westfall Volvo in Kansas City, is that right?

A Right.

Q And Exhibit 118-A reflects the number of trucks involved in this transaction, doesn't it?

A Yes, it does.

Q And, what was the concession amount granted to this other dealer?

A 22.4.

Q Which is a higher concession or a greater discount than what you received for your, what, 20-truck deal?

A Yes.

[189] Q How does that affect the price? Obviously the higher the discount to the other dealer, the lower the price to the other dealer, right?

A That's correct.

Q Does that apply to all of these examples that we have gone through?

A What, the fact that the concession affects the price to the dealer?

Q Yes. That the other – with regard to all of these comparisons that we have made, that the higher concession amount granted to the other dealer resulted in a lower price to the other dealer than to Reeder-Simco in those comparisons?

A Yes.

Q And with respect to all of these transactions where Reeder-Simco purchased trucks from Volvo, all of these trucks were shipped across state lines, weren't they?

A Yes.

Q Bill, do you compete with these other Volvo dealers?

A Sure.

Q How do you compete with these other Volvo dealers?

A We operate on the same customers, so that many times our customers are liable to check my price at another dealership before they go ahead and give me an order. I could be dealing with a transient customer that comes through my place and they go to Dallas or Kansas City. Happens all the time.

[190] Q With regard to all of these transactions, these all deal with information that we were able to obtain from Volvo which was restricted to the Southwest Region, is that correct?

A The data we've looked at has been restricted to the Southwest Region.

Q All right. And so all of these comparisons that we've dealt with and that we will deal with in a moment concern transactions within the Southwest Region?

MR. WILLIAMS: Your Honor, I'm sorry. I object. That's the fourth leading question in a row I've heard and I object to that. It's his witness.

THE COURT: Yeah. Maybe you can rephrase the question. I'll sustain the objection.

Q Where were the other dealers located with respect to the comparisons we've just done?

A All of the dealers in the comparisons we have studied are also within the Southwest Region.

MR. BYARS: Your Honor, I'm going to request the admission of Defendant's Exhibit 249. It's a little prettier than mine.

MR. WILLIAMS: Your Honor, we always like compliments on our Exhibits. We'll agree with him. We have no objection.

THE COURT: Yeah. We will admit pretty Exhibit 249 as Defendant's Exhibit, but it's being – it's coming in as a Plaintiff's Exhibit.

[191] Q Bill, is that a map of the Southwest Region?

A Yes.

Q Are there any significant types of trade barriers among customers within this region?

A No, sir.

Q And have you actually shipped Volvo trucks throughout this region?

A Yes.

Q Ship trucks to Houston?

A Excuse me?

Q Ship trucks to Oklahoma?

A Sure. I just – I haven't done Mississippi and I don't believe I've done Kansas, and everything else I believe – perhaps those counties in New Mexico.

Q All right.

A I think that's how those state boundaries are. I've shipped them up to Kansas City.

Q Is there anything in particular about these geographics here that would restrict in any way the flow of the transport of heavy trucks?

A No, sir. This is just a management map.

Q No mountain ranges; no other difficulties in transporting trucks?

A Interstate roads. There's no mountains or oceans or –

MR. BYARS: Your Honor, we're about to go to a [192] different area. It's about 10 minutes till 12:00. Would you like for me to continue or should we – I'm going to go into some different comparisons at this time.

THE COURT: How long do you think it will take with those different comparisons?

MR. BYARS: The next comparison involves Tommy Davidson Trucking and that will take a little bit of time. We may be able to finish it in 10 minutes.

THE COURT: Why don't we do it and then once we finish with that, are you going into another area or –

MR. BYARS: We have a few, a few more comparisons, Your Honor.

THE COURT: Why don't we do another one, if we can?

MR. BYARS: All right.

Q Let me direct your attention to Exhibit 135.

A Yes, sir.

MR. BYARS: Your Honor, on this we're going be seeking to admit documents which have Plaintiff's Exhibits No. 135, 135-A, 136, 136-A, 137, 138, 138-A, 138-B, 138-C, we move for the admission of those Exhibits.

THE COURT: Any objections?

MR. WILLIAMS: Yes, Your Honor, I do have an objection, but perhaps we should approach the bench on those.

THE COURT: Ladies and gentlemen of the jury, I'm going to let you break for lunch. It's five till 12:00. We need to be

* * *

[196] MR. WILLIAMS: Right.

THE COURT: I'm going to admit all of those to include any sub parts or alphabetical listings. Those will be admitted over the objection of the Defendant. I will give you an exception and a continuing objection as those are reached. I don't know it will be necessary to renew your objection. I'm hoping we've taken care of it here.

MR. WILLIAMS: I hope so, too, Your Honor, so we can move things along.

THE COURT: But I am – I try to give advice where the Eighth Circuit is concerned, but sometimes it's not good advice, so . . . Anything further anyone wants to put on the record with the jury out of the room.

MR. BYARS: I can just – I can see that we're going to need to raise an issue outside the presence of the

jury soon and that pertains to – I'm a little bit confused and I want to be careful as we get into the issue of termination, where we are with regard to any offer by Volvo to Reeder-Simco for a new franchise agreement, the fact that there is no franchise agreement in place.

THE COURT: The only, the only rulings the Court has made had to do with a letter of termination, an alleged termination. I've not seen the letter. And I only do that because of a Motion in Limine. There was then two other parts to that Motion in Limine. There was an effort to keep that letter [197] out, as well as to keep out evidence of some sort of filing with the Arkansas Motor Vehicle Commission, and the third part of that, as I recall, had to do with a federal lawsuit that was filed in Little Rock, and I sustained the second, the second and third part of that motion and said I believe until I heard otherwise I was going to – the termination letter was I think relevant.

MR. BYARS: All right. And –

THE COURT: And having said that, I think the defense probably can say too that I thought, is the agreement not – is it not still in effect?

MR. WILLIAMS: Your Honor, the agreement is – well, I mean the way we see it, the agreement was in effect when the letter was sent, and we could argue about whether that was really a termination letter or not, but setting that aside, they filed the complaint.

THE COURT: Well, I think you've called it that in your Motion in Limine.

MR. WILLIAMS: Right, right. They filed a complaint and the complaint, as a matter of law under

Arkansas law, prevented any termination from going forward until the resolution of the complaint within the jurisdiction of the Motor Vehicle Commission. And then after that nothing happened and then in March of 2001 Plaintiff was in fact offered a new agreement, which the Plaintiff has refused to sign and return.

[198] THE COURT: Are you proposing to introduce evidence concerning a new franchise offer or –

MR. BYARS: Yes. We are. And I think I'm just having a hard time understanding why the jury can't understand the facts. I mean the fact was they sent this letter. The fact is that the Arkansas Motor Vehicle Commission sent a letter to Mr. Reeder saying we have received this official notice; you have a right to file a complaint. That's what we did. And that's how we are here. I mean those are facts that I don't think we can deny, and so when we get into these issues of – well, how was it that you're able to sell ABF, it's – as a matter of law we have been not terminated due to the fact that we have this pending complaint with the Arkansas Motor Vehicle Commission. The letter offering the new franchise agreement over a year – well, over a year later has not been signed because of issues, in that the agreement contains provisions which we believe are not legal in the State of Arkansas.

MR. SHANNON: It's the same agreement offered to every dealer in the United States, Your Honor.

THE COURT: Yeah. And I think that's probably, you know, relevant. I don't know really, Mr. Byars, what you're asking me to do or what I'm being asked to rule on. I can't give you advice on how to proceed in your lawsuit.

MR. BYARS: Well, I just – can we talk about the fact that – I mean without admitting the complaint into evidence, can [199] we talk about the fact that that's what happened?

THE COURT: You mean although you can't talk – if you want to know – if you can have testimony about the complaint, about the complaint itself, I think not. But I don't know – I'm not sure I know why you need that.

MR. BYARS: Well, otherwise it's a mystery on where we are. I mean it –

THE COURT: Well, they have sent a letter, you know, they have characterized it as a termination letter, and then I don't know that there's anything that precludes you from introducing this new agreement they are trying to get you to sign that you won't. I don't know what that does to your lawsuit.

MR. BYARS: Well, is it a problem to say that when asked why haven't you signed the franchise agreement to say, well, we believe it's not legal under Arkansas law?

THE COURT: I don't know that you can – I don't think that – that may not be a proper response. There may be, there are items in there which weren't in the old agreement on which we disagree. I think that's legitimate. I don't think you can –

MR. WILLIAMS: Your Honor, the fact is that they have been and continue to be an authorized Volvo dealer through this whole time period and anything beyond that really I think is trying to try and drag into this court a matter that's not before this court; that is, were they terminated and does that termination violate

the Arkansas Motor Vehicle Commission Act? [200] They haven't raised it. They haven't pled it.

THE COURT: Well, they may not have, but you know, you characterise it as a letter of termination, so I assume that's some evidence that –

MR. WILLIAMS: I think it was a letter of proposed termination. I don't know how we said it, but I'll go back and look at it, but I mean it's clearly capable of more than one characterization, Your Honor.

MR. CHRISTIAN: Judge, I've been real quiet throughout all of this.

THE COURT: I know and I've been surprised at that, too, Mr. Christian.

MR. CHRISTIAN: Well, may I just add this one thing?

THE COURT: Yeah, you may. Yeah, we would like to hear from you.

MR. CHRISTIAN: We feel like that in order to explain why we've continued on as a Volvo dealer, we should be entitled to show that we objected to the Motor Vehicle Commission so that that stopped the termination. Now, we feel like that's very relevant to why we continue on as a dealer or in the capacity as a dealer.

THE COURT: I thought I heard some argument from somebody and it may have been from the defense that once you filed this lawsuit, that somehow or other the dealership continued somehow. Did I not hear that?

[201] MR. SHANNON: You didn't hear it from us.

MR. WILLIAMS: Didn't hear it from us, I don't believe.

MR. BYARS: Not from us.

MR. WILLIAMS: I mean I think it's just speculation to say but for the fact that the Motor Vehicle Commission didn't have a hearing, that they would no longer be a dealer, and that's what the Plaintiffs are trying to say.

THE COURT: What happened to the lawsuit?

MR. WILLIAMS: Judge Howard abstained. We filed a claim saying that it was a violation of various constitutional provisions because of the way the Act is structured and the Commission is structured, and Judge Howard decided to abstain and said it was a state law issue, ought to give the state courts first shot at it.

MR. BYARS: And that was dismissed in October of this year.

MR. SHANNON: But the Motor Vehicle Commission has not heard any –

MR. BYARS: The Motor Vehicle Commission has not yet acted on the complaint. So the entire time that this cause was pending in the Eastern District, we could not get a hearing before the Arkansas Motor Vehicle Commission, so as a matter of law –

THE COURT: What's wrong with saying that a complaint was filed, not introducing the complaint, just saying a complaint [202] was filed?

MR. SHANNON: Your Honor, it brings in lots of issues. I mean just saying a complaint was filed, the jury is allowed to presume – I apologize –

THE COURT: No.

MR. SHANNON: – presume that they got – you know, they filed a complaint and stopped it. You know, and that's not what happened.

THE COURT: Well, what about a complaint was filed and it hasn't been heard? It's in Never-never Land or whatever? I mean it's a difficult issue for you. It's an equally if not more difficult issue for the Plaintiffs here. I'm trying to figure out some way to – but why not – why couldn't he say that a complaint was filed which had the effect of simply, you know, placing the suspension issue in suspense?

MR. CHRISTIAN: That's what happened.

MR. SHANNON: Well, I think it gives the impression that, you know, that Volvo was going to terminate them other than, other than if the complaint was filed. And I don't think that has, been established.

MR. CHRISTIAN: Judge, when you see the letter, the word "terminate" and the termination date is clearly set forth. Now –

MR. SHANNON: It says if your performance –

MR. CHRISTIAN: That's where the impression that Volvo [203] was going to terminate came from.

MR. SHANNON: If your performance does not improve, then you will be terminated.

MR. WILLIAMS: For the entire year.

THE COURT: Well, let me think about it, but I'm inclined, I don't know how else out of it. I think if we

don't do this, we may really have the jury confused. And I am inclined to say that a complaint was filed. It has not – I don't want to mention the federal court lawsuit.

MR. WILLIAMS: Right.

THE COURT: The complaint was filed with the Arkansas Motor Vehicle Commission. It has not been heard and everything is just in limbo. What's wrong with that?

MR. WILLIAMS: Well, I think –

MR. BYARS: Well, I think that we could just – would indicate that as a matter of law any attempt to terminate is ineffective.

MR. WILLIAMS: See, now he's really – he's lapping over into the commissioners –

THE COURT: I think so, too, and I may not permit that, but –

MR. WILLIAMS: I mean, Your Honor, again, the underlying principle for us is this jury should not be prejudiced by allegations of termination that have not been raised and cannot be raised before this Court, and I'm not saying he's doing [204] that with that intent, but I certainly think it will have that effect.

THE COURT: Well, I think that, you know, if the letter gets in, I'm admitting the letter. I think that goes to good faith and the Franchise Practices Act and whatever. Then I think a subsequent question is going to be, you know, where do we go from here with reference to the termination? And I think a suggestion, or we may say that matter remains, remains pending, has not been

resolved, that there's no hearing on it. I want us to be careful how we do it, Joe, Mr. Byars.

MR. WILLIAMS: Are we going for Limiting Instruction D Your Honor?

THE COURT: I've had about all the limiting instructions – listen. My writing has gotten so bad that I even think Bettye had trouble reading Number C.

MR. BYARS: Well, we will just deal with it as it comes.

THE COURT: Well, no – I appreciate a heads-up, but, you know, I'm telling you I think that's how I want it handled, though. Is there any question about how we are going to handle it?

MR. WILLIAMS: Can we agree –

THE COURT: I'm not saying that anybody can't agree to it or whatever, but the Plaintiff cannot have it both ways, nor can the defense for that matter. We need to – I don't want [205] to – but I think you can say and I don't want it admitted that there was a complaint filed and the issue then with the franchise is that termination issue has just –

MR. SHANNON: But what I would consider what you've ruled here is that any attempt to say something to the effect of that we filed it and stopped the termination is too far.

THE COURT: Who is – they are going to say –

MR. SHANNON: That's what I think they are going to say.

THE COURT: No, no. Just say it hasn't stopped it. It simply hasn't been heard. Are we straight on that, Mr. Byars?

MR. BYARS: I believe so.

THE COURT: Well, I need a little more than I believe so.

MR. BYARS: Well, this witness, Mr. Heck –

MR. HECK: Excuse me?

THE COURT: Well, why don't you talk to Mister – you know, you talk with Mr. Heck, and why don't we assemble maybe at five till 1:00 after we've had a chance to reflect on it during the short lunch hour, but I think that's probably the best way to handle this, and it apparently doesn't please anybody, but I think it probably keeps the jury from just getting hopelessly bogged down or whatever. I'll see you-all at five till 1:00.

MR. WILLIAMS: All right. Thank you, Your Honor.

(Off the record at this time.)

[206] THE COURT: You-all want to put anything else on the record? When we broke for lunch, we were talking about how to handle the cancellation or the proposed cancellation of the franchise and how much to get into the hearing in front of the revenue commission or the whatever deal. Any further thoughts, Mr. Byars? Motor Vehicle Commission. I thought all they did was issue inspection stickers and whatever.

MR. BYARS: Well, we – one thing that I believe is going to come up also is the letter that was received

from Volvo is one. Then there is the letter that was issued by the Motor Vehicle Commission to Reeder-Simco is another Exhibit that does not pertain to the complaint. I mean there's no – there was another issue – a letter – after the Motor Vehicle Commission received Volvo's letter, the Motor Vehicle Commission sends a letter to Reeder-Simco.

MR. WILLIAMS: It's hearsay, Your Honor. I mean . . .

THE COURT: Well, I don't know about hearsay. It's just, you know, I think the issue – we have an issue – we have a federal statute we are concerned about. Then we are concerned about the Arkansas Franchise Practices Act or whatever. Let's talk about good faith or maybe lack of bad faith or whatever, but this lawsuit I don't think is about the cancellation of a – we're talking about the termination of a dealership. Good faith may be an issue. I think the letter as sent by Volvo, therefore, to Reeder-Simco is probably relevant and admissible and whatever, [207] but I think if we go much more than that, as we discussed before lunch, that there was a – there was a hearing request and it's just not been heard. It's just sort of in limbo. And that's where it is. I think if we go much farther than that, I think, you know, that all sides are on dangerous ice or thin ice.

MR. WILLIAMS: Judge – I hear what you're saying. I just want to make sure. Is this something you're instructing the parties that we're to observe or do you intend to give a mention to the jury of this or how do you –

THE COURT: Well, I'm hopeful that that's the way that we're going to go and that's how I am instructing us to proceed and what to avoid and whatever. I just think we're – What I don't want to do is spend two days here, as

much trouble as we spent in preparation and have a mistrial.

MR. WILLIAMS: Well, that's –

THE COURT: I think we are dangerously – I think we are getting pretty far afield, and I know we've got the 500 trucks to ABF as an issue and I know that's going to come up, so obviously the franchise must not have been cancelled, but by the same token, I think that's probably all they have done from and since then is probably those 500 trucks. So that's where I'm hoping it goes and that's where I'm instructing you to go and maybe we can get through the minefield without a very large explosion. How much longer you think you're going to be with him, Mr. Byars, in view of the fact that I think most of the

* * *

[212] that truck resulting to our dealer price. It makes the damage too high.

Q Okay. Just to look back on what the percentage was to the other Volvo dealer, that was 18.4 percent?

A Close enough, 04.

Q 18.04 percent. And then with regard to –

MR. CHRISTIAN: It's not showing up on –

MS. PORTER: I'm sorry.

Q I'm sorry.

MS. PORTER: Let me . . . Sorry.

Q The other dealer, 18.04 percent. Your sale, 13.27 percent?

A That's correct.

Q Is that right?

A Yes.

Q Now, had you received the concession actually granted to the other dealer, what would have been your resulting price?

A It would have been lower than the amount of $3,058 per truck.

Q $3,058 per truck?

A Right.

Q Multiplied by the three trucks is what?

A 9,176, $9,176.

Q And that's on the comparison on Ludington, is that correct?

A Yes, sir.

Q You had a – you were looking to make a sale to Tommy [213] Davidson, Inc, is that right?

A Yes.

Q And when was that?

A It was in July of 1997. Can you refer me to that Exhibit Number, please?

Q That's 135. How did you make this contact with this customer?

A Our company had been contacting him for several years. This particular contact resulted in a call by our salesman, Vaughn Drum.

Q All right. And take us through the transactions. What did you do?

A We got together and figured out the truck specifications and made a request for concession as reflected in this document here.

Q So you requested a concession on what was it, five trucks?

A Yeah. This is a poor copy. Five VNL 64 T 610 models on July 3rd, 1997.

Q And you requested 20, is that 22 percent?

A That's correct.

Q And what happened next?

A We received 17 percent and –

Q Is that indicated here on Exhibit 135?

A Yes. It's on line 16. That's a 17 percent I believe. It's difficult to make it out.

Q And this – you stated the date here on the fax indicates – [214] well, that's pretty small.

A Yeah. That would support it. The July 3rd, 97.

Q You faxed a request on July 3rd of 97?

A Yes, at 5:00 o'clock.

Q Okay. And then when did you get approval at 17 percent?

A On July 7th.

Q Okay. And that's shown right here, is that correct?

A Yes, and also confirmed by the date on the very top.

Q Okay. Now, you see this notation here?

A Yes.

Q Was that on the initial fax when you first got back the approval for 17 percent?

A No, sir.

Q Well, explain what happened between the approval for 17 percent and the next figure you received.

A Well, the 17 percent, we had started to prepare our final quotation to the customer based on the 17 percent, and then we received notification of an increase to 18.1 percent, and it has the words "to equalize concession."

Q All right. And did you understand what that meant at the time?

A Yes. What that meant to me was that there was another dealer on the same transaction.

Q And so what happened next?

A Well, what was going on here was Volvo Trucks are – they [215] are a premium truck. And we are trained by Volvo to always try to obtain a premium price for this product. So when we commented that the 22 percent was what we really needed to be competitive on this deal with Freightliner and International or Kenworth – I can't make out that notation down there.

Q Those notations are here on this concession request. You made notes of the situation down here, is that right?

A Yeah, there they are. Okay. So we were basically told to quote the thing at 17 percent, but we hadn't done it yet, and we got this notification for 18.1 percent.

Q All right.

A So then we were also told, you know, to quote it at 17 percent was to, you know, a reminder to take the truck down there and show it to the customer and have them drive it and see the quality of it. We thought that was good advice. That was also our policy. So we prepared our quotation at the 18.1 percent concession level; in other words, what was derived from that concession. We took the truck, and Vaughn Drum, the salesman, and myself went to Tommy Davidson Trucking and presented the bid. I believe the man's name is Mr. Smith. We presented the bid based on the 18.1 and we had him drive the vehicle.

Q All right. And then what happened?

A Have to go to No. 136. Okay. 136 is the – the concession is now 18.9 percent. And what transpired –

[216] Q Was this after you had given the customer, Tommy Davidson, what you felt to be your firm price?

A Yes. We indicated to Mr. Davidson that this was the best price, and a fair price for a Volvo tractor of this quality.

Q And then what was it, about seven days later that you received the 18.9 percent?

A Yeah. That's what's reflected on this document. July 14th

Q Okay. So what happened next?

A As memory best serves me, I had a conversation with Mr. Truta about this, was the first thing that happened.

Q All right. What was said?

A I advised Mr. Truta that I thought this was an improper thing to do; that I had already quoted the truck based on the 18.1 percent that we had also had a conversation about, and I thought that before he raised the number again, that he should have called me and found out if I was in a position to accept that same price level. And if he had done that – I can't say – well, forget that. I just told him I didn't like what he did. And I said that I was going to requote it at the higher price level, but I would have to do it by myself.

Q Okay. And why was that?

A Vaughn Drum refused to do it.

MR. WILLIAMS: Objection, Your Honor.

THE COURT: Yeah. You can't tell what Mr. Drum did.

A Okay.

[217] Q Well, so you requoted the deal after you had already told the customer what the firm price was?

A Yes.

Q And so what happened?

A The customer was known to have bought Freightliner. J D Wilson is his name, the man's name.

Q Let me show you Exhibit 138. Does that reflect your discussions with Mr. Truta, Bill?

A Yes, it does.

Q And what is the, it says, this afternoon I received another concession confirmation for Tommy Davidson, Inc. The approved amount is now 18.9 percent. Can you please call me and explain what is going on? I have already priced the units to the customer using the 18.1 concession you bumped from 17 percent. The customer said we were looking good. We quoted this deal with very low profit to get some numbers on the board. Our conversation on this was that we had to sell the benefits of VN and the customer had to drive the truck. I drove the truck with the customer last Wednesday. He was very impressed with the VN and then Mr. Truta gives a response. Well, what happened on, what happened on the transaction? Were you able to make the sale?

A No. The sale was lost to Reeder-Simco as well as Volvo.

Q And why do you think that happened?

A Excuse me?

[218] Q Why?

MR. WILLIAMS: Objection, Your Honor. I think it calls for speculation on the part of the witness.

THE COURT: I'm going to let him speculate. You may answer. Your objection is overruled.

A I believe we ruined our credibility with the customer.

Q Let me show you Exhibit 135-A. What is this document? Is that a document that you received from Volvo in the discovery process?

A That's a response to some of our requests for information.

Q Okay. And this reflects –

A New quotes.

Q New quotes.

A Week ending July 10th, 97. I've got my strong glasses on.

Q Okay.

A It's up at the top, very top.

Q At 18.1 percent on the VNL 64 T 610's, and there were five on that transaction.

A That's a reflection of our transaction that we submitted.

Q Okay. All right. And this 136-A shows the concession that was granted to the other Volvo dealer.

A Joe, can you help me find that on my copy, so I can depend on that?

Q Can you see that one on the screen?

A That would be the other dealer's approval at 18.9 percent.

[219] Q All right.

A Yes, it would.

Q Let me show you what's been marked as Exhibit 138-A. This is an invoice from Volvo to the Volvo dealer known as the Volvo and GMC Trucks of Dallas. With respect to the sale of the 1998 VNL 64 T, is that what you were quoting on the Tommy Davidson transaction?

A Yes.

Q And you eventually received the 18.9, but it was too late, is that right?

MR. WILLIAMS: Objection, Your Honor. He's – that's leading.

THE COURT: Try not to lead.

Q You eventually received 18.9, didn't you, off Tommy Davidson?

A After the fact.

Q And then 138-B reflects that this other dealer on a five truck deal obtained 22.5 percent, is that correct?

A Exhibit 138-B reflects 22 and a half percent.

Q I'm sorry. Yes. 22.5 percent. And with that concession amount, this other dealer, Volvo and GMC Trucks of Dallas, was able to make a sale, wasn't it?

A Yes. These are only sales comparisons, these results. These are not strictly bids.

Q And in addition to that, take a look at 138-C.

[220] A Yes, sir.

Q Does that involve yet another Volvo dealer in this timeframe receiving a concession of 22.5 percent?

A Yes, sir, same model.

Q And 138-C, the next page. Does that reflect another Volvo dealer on another deal receiving 23.9 percent on the same model?

A It reflects –

Q In the same timeframe?

A 23.9 percent on VNL 64 T 610. It appears to be the same dealer as the previous Exhibit.

Q And the next page, that's another VNL 6410. Different Volvo dealer. This was February of 98, at 21.5 percent, is that correct?

A Right, one truck.

Q I'm sorry?

A Postmarked February of 97.

Q February of 97, is that correct?

A Yeah. We are in 1997. I'm sorry.

Q At 21.5 percent? Another VNL 64 T 610 to dealer 5547 D, another Volvo dealer, 21.7 percent?

A That's correct.

Q Another transaction this time to dealer 5383 D?

MR. WILLIAMS: Your Honor, may we approach the bench? We need to address something with the Court.

THE COURT: Yes

[221] MR. WILLIAMS: Thank you, Your Honor.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

THE COURT: What's up?

MR. WILLIAMS: Well, it appears to us, Your Honor, that we are getting some comparisons. We are being sandbag here a little bit. We asked for and tried to get all of these comparisons and now I don't think that we've – it's not in this affidavit. We've never seen these before. We obviously are prepared for trial to answer these comparisons, and now we're getting something that was not provided to us.

MR. BYARS: I disagree. I mean you've had these Exhibits. I mean –

MR. SHANNON: No, I don't.

MR. BYARS: These exhibits were provided to us by Volvo.

MR. WILLIAMS: As part of a 14,000 –

MR. SHANNON: For 16, 17,000 trucks.

MR. WILLIAMS: – trucks, Your Honor.

THE COURT: I thought we had agreed that these Exhibits could be admitted.

MR. WILLIAMS: My understanding was they were coming in based upon what was basically in his affidavit and that was – I'm trying to expedite matters, Your Honor.

MR. SHANNON: Your Honor, I mean if you want to look at [222] at his affidavit and see what he's –

THE COURT: I've seen it. I've got –

MR. SHANNON: He only uses one comparison to the Tommy Davidson deal and we've gone through about seven here, and, you know, I want to have an opportunity for our witness to go back and do research and try to figure out to rebut these deals.

MR. WILLIAMS: He's coming down here Greensboro. He's in a plane, if he's not already landed right now, Your Honor.

MR. BYARS: Just because I didn't put something in an affidavit in a response to a Motion for Summary Judgment doesn't mean I can't use it later. The document was produced by Volvo in discovery.

THE COURT: I'm inclined to agree with you. How many more do you have?

MR. BYARS: That it's on this one.

MR. SHANNON: Your Honor, we had discovery requests asking for him to show us what, you know, how you intend –

THE COURT: Let me say this. If there's an objection, I'm overruling your objection. In order to save us another trip, are we going to have this come up on any other – are you using any other exhibits that were not reflected in –

MR. BYARS: In his affidavit? Possibly. That's possible. I mean we've produced these Exhibits previously. These are documents that were produced to us by Volvo.

MR. WILLIAMS: Your Honor, we asked for damage. We [223] wanted to know what are your damages?

THE COURT: I know.

MR. WILLIAMS: And they said it was going to be – a witness who is not going to be here, and then we asked to supplement and we didn't get any supplementation. All we got was his affidavit and some summary charts they were going to get into. So we did not have notice that they were going to rely on these comparisons for damages, and to the degree the Court's going to let them in, we will have to ask for a continuance or a recess in order to be able to address these.

THE COURT: Well, I am going to overrule your objection. You'll have some time after he finishes and hopefully you can get your guy prepared, but I am concerned about how many more you've got.

MR. SHANNON: He can't get prepared here.

THE COURT: I want to hear from Mr. Byars.

MR. BYARS: There's nothing else on Tommy Davidson.

THE COURT: I know about Tommy Davidson.

MR. BYARS: Let me tell you. This one was a little longer non-sale comparison. The rest of them we're going to be looking at a Reeder-Simco guy versus another dealer.

THE COURT: Well, are they included within the deposition – the affidavit is what I'm trying to say probably.

MR. BYARS: I can't remember whether all of them are in the affidavit or not. I mean –

[224] MR. SHANNON: Your Honor, we relied on – I mean this was the only semblance of a discovery response we got.

THE COURT: Well, you know, you've got the numbers of Exhibits that have been introduced in this matter. My suggestion would be let's kind of see if I can give them a brief break and compare your Exhibits with what you believe to be the affidavit and let's address it and we'll go from there. Okay?

MR. WILLIAMS: Okay. Thank you, Your Honor.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: There's some matters I need to take up with the Court – with the attorneys. I think you could either remain in place here or it may be more comfortable to go back and see if there are any doughnuts left. It's too early for a break, but I think you may be more comfortable and let us hear it here. We're not talking about you guys when we have these conferences. I want you to know that. I remember seeing I think, Mr. Carpenter, aren't you from Waldron?

A Yes.

THE COURT: You know, Dizzy Dean was from Lucas which is right outside of Waldron. And I remember when I was a kid, I saw a movie about Dizzy Dean and the pitcher who I think was Dan Duryea, was acting the role of Dizzy Dean, but he was always having a conference with the catcher, and everyone was always saying in the

audience or in the crowd wonder what are they [225] talking about? They were talking about where they were going to have dinner or something, but I want you to know that we're not talking about dinner or whatever, but these are things that should expedite the trial and whatever. We are going to remain in session until you're out of the room, but remember the prior admonition of the Court not to discuss this with anyone or allow anyone to discuss it with you. Thank you very much.

(The jury leaves the courtoom. The following proceedings were had outside of the hearing of the jury:)

THE COURT: Okay, boys. It's seven minutes till 2:00. We've had a pretty lengthy recess. We've discussed the Exhibits we have agreed to introduce. Any problems with the Exhibits? What's the problem on the remaining Exhibits?

MR. WILLIAMS: Your Honor, the problem – part – in terms of shear numbers what we've got is Exhibit 138 itself is what I thought we were introducing which is a copy of the e-mail from Mr. Heck to Mr. Truta and in return from Mr. Truta back, and then there's a 138-A, B and C which includes a total, I believe, of eight comparisons which Mr. Heck's already dealt with which we already know, and, from looking at it, there's no way from seeing this, these documents were not attached to and part of this e-mail.

MR. SHANNON: And also not discussed in this affidavit.

MR. WILLIAMS: Not discussed in the affidavit, so we had no prior notice that these comparisons were going to be made, [226] and then on the others, there's one

more, on the Beach Trucking matter where it appears there were four comparisons again, which there was no previous notice despite requests in discovery and for supplemental discovery, so we are not prepared on those. It appears to us on the rest of them that we are okay.

THE COURT: Have you provided – on any of the information – I know it came from them – on the Beach, those four Exhibits?

MR. BYARS: Well, we provided them with these Exhibits which we got –

MR. SHANNON: Friday.

MR. WILLIAMS: Got Friday.

MR. BYARS: – at the pre-trial conference. I'm not sure when I – we may have sent you those in advance of Friday.

MR. SHANNON: I can tell you that some of these were the affidavit, but A, B and C I do not believe were part of the affidavit.

THE COURT: I tell you what –

MR. BYARS: I don't believe there is a specific –

THE COURT: Joe, let me finish. I'm going to admit them over your objections. When your man comes and he's coming from –

MR. WILLIAMS: Greensboro.

THE COURT: – North Carolina or wherever, the Court will give serious consideration to letting you, I think you ask [227] him a question sort of as follows: Have you had a chance to view these, and if he says no, you can

follow up with do you believe that your analysis of those would be any different from the ones you did analyze? I don't want you to get blindsided, but by the same token I think they are exhibits, and perhaps there's something that your guy in the short period of time can get prepped on.

MR. SHANNON: He's done all his work in Greensboro where he has –

THE COURT: Well, I understand, but we've got phones here. You're far from the civilizing influence and from Little Rock and whatever, but you can call and probably have stuff faxed here and whatever, but I'm going to admit them, but I'll give you substantial latitude in using direct examination on him concerning those exhibits.

MR. BYARS: Thank you, Your Honor.

THE COURT: I understand your position. Get them back in, please.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: That took a little longer than we thought, but I think we were well-advised that you go back there, but go ahead and continue, sir.

MR. BYARS: Thank you, Your Honor.

BY MR. BYARS:

[228] Q Mr. Heck, you were working on a sale to Beach Trucking in January 29th or January of 1998, is that right?

A Yes, sir.

Q How was it that you made contact with this potential customer?

A I contacted them in Little Rock as a result of knowledge that they operated trucks.

Q And what model truck were they seeking to purchase or had at interest in?

A VNL 64T 610.

Q And how many?

A 170.

Q Did you request a concession of 26.7 or 26 percent?

A Yes.

Q And what concession amount was approved?

A 23.8 percent.

Q Was the 23.8 percent enough to get the deal?

A No.

Q Did you submit a quote to Beach Trucking based on the pricing at 23.8 percent?

A Yes.

Q Let me show you what's been marked and admitted as Plaintiff's Exhibit 239. Is this an invoice to another Volvo dealer known as Great Southern Volvo Transportation in Jackson, Mississippi?

[229] A Is this Exhibit 140?

Q 239. I'm sorry.

A Yes. That's Great Southern, Jackson, Mississippi.

Q And this was – this involved a sale by Volvo to that dealer for a 1999 VNL 64T, is that correct?

A Yes.

Q That was for a customer of Total Transportation, is that right?

A Right.

Q About how many trucks was this dealer bidding on?

A Can you read me the first and last serial number?

Q Yes. It's 566590, 566836.

A That would be approximately 247, unless I misunderstood your numbers.

Q Well, I think that's a greater number than appears on this list.

A What Exhibit is it, please?

Q It's Exhibit 239, 239-A. I'm sorry. And I believe there are 33 trucks that appear on one page. This is about a page and a half.

A I see. There are breaks in the serial number sequence.

THE COURT: Mr. Byars, if you know, I'd permit a question I think that would suggest the answer to him.

BY MR. BYARS:

Q Well, let me ask it this way: Are there, are there 60 or [230] less?

A Exactly 60 from my rapid hand count. I would accept 55 or 65.

Q Okay. And you were looking at a bid of 170?

A Yes.

Q What was the concession amount approved for this Volvo dealer?

A 26.1, 26.1.

Q 26.1 percent? That obviously resulted in a sale for that dealer, is that right?

A Yes. These are sales.

Q Let me show you another invoice that's marked as Plaintiff's Exhibit No. 241, and is that an invoice from Volvo to Doonan Truck and Equipment of Wichita, Kansas, with reference to a sale to Vulcan Materials?

A Yes, it is.

Q And that's also for a 1999 VNL 64 T?

A That's correct.

Q Would you look at Plaintiff's Exhibit No. 241-A. What does this Exhibit indicate as far as the number of trucks involved in that transaction?

A I believe ten.

Q Okay. Now, with regard to Vulcan Materials, it was a – there was a price change in 1998, wasn't there?

A Yes, between say January and March. We discussed that [231] previously.

Q Okay. Well –

A It would be hard to make that comparison. We could do it, Joe, but it would take a long time.

Q In the interests of time, why don't we not get into that one at this time?

A That's all right with me.

Q Let me have you look at Exhibit No. 148. (Pause)

A Okay.

Q Was Reeder-Simco seeking to sell trucks to REC Transport?

A That's correct.

Q And how did you make contact with this customer?

A One of our salesmen had made contact.

Q And this was in May of 1998?

A Correct.

Q And what was the number of trucks sought on this transaction?

A Five.

Q All right. There was a concession request of 21 percent?

A Yes.

Q And what was the amount of the concession approved?

A Two. Joe, could I say something else about that number?

Q Sure.

A This is probably an example of the confusion on this salesman's part. It probably would have been more reasonable to [232] ask for 10 or 12 percent, but he did not fully understand this change in the pricing structure between the two periods. So that would explain his 21 percent request, I would believe.

Q Okay. But what was granted on this four to five truck transaction was 2 percent?

A Yes.

Q And that was for model VNL 64 T 420 or VNM 64 T, is that correct?

A That's correct.

Q Let me show you what's been marked and admitted as Exhibit 149. This is an invoice from Volvo to the Westfall Volvo GMC Trucks dealership in Kansas City reflecting a sale for Lezzer Lumber?

A Yes, sir.

Q And what's the postmark date with regard to this transaction?

A May 20th, 1998.

Q Okay. And the date of your concession request on REC Transport was May 5th of 98?

A That's correct.

Q All right. And this also involves the VNM, 1999 model VNM 64 T, is that correct?

A Yes. And the same base model on that price.

Q Okay. Same base model and that price of 55,662?

A That's correct.

[233] Q What was the concession amount granted to this other Volvo dealer?

A 10.6 percent.

Q All right. And that's also reflected on this Exhibit 149-A, is that right?

A Yeah.

Q And that shows that this was a three-truck transaction –

A Right.

Q – where this other Volvo dealer got a greater concession, is that correct?

A That's correct. That's correct.

Q Also, on the same comparison let's take a look at Plaintiff's Exhibit No. 150. Is this an invoice to another Volvo dealer, General Truck Sales and Service, reflecting a transaction involving a 1999 VNM 64 T?

A Yes, with the same base price.

Q All right. Same base price as shown here on this Exhibit? And postmark date on this transaction is April 8, 1998?

A That's correct.

Q And yours was May 5th of 98.

A Yes.

Q So the same base model price. There's no price increase that affects this transaction, is that correct?

A They are the same price increase, same data book price would apply.

[234] Q Okay. And this dealer with respect to the Cargo Logistics received eight percent on one of the trucks and 11.3 percent on the other, is that correct?

A That is what it shows; yes.

Q The same transaction, this is another – this is an invoice from Volvo – this is Exhibit, Plaintiff's Exhibit 151. Is this a copy of an invoice from Volvo to another Volvo dealer, Chief Truck and Equipment Center, in Doonan, Oklahoma?

A Yes, Duncan.

Q Duncan, Oklahoma. I'm sorry.

A Yes, sir.

Q And is this also for the 1999 VNL? That's a VNL 64 T.

A This would not be a proper –

Q That's a different model, is that correct?

A That is correct. Would that perhaps be the other model we quoted? No.

Q No. That's my fault.

A That's all right.

Q Let's not look at – we'll withdraw that one.

THE COURT: Which one are you withdrawing?

MR. BYARS: 151 and 150 – I'm sorry. It's – yes, it's 151 and 151-A, Your Honor.

A That is a comparison to that other truck though. Yeah, you can leave it out if you want to, you know, the point's made.

Q Let's take a look at Exhibits 153 and 154.

[235] A Yeah.

Q We've heard about Trans States Lines. Had Reeder-Simco prior to May of 1998 previously sold trucks to TSL, Trans States Lines?

A We have sold quite a few trucks to Trans States Lines.

Q And were you making a bid to Trans States Lines in May of 1998?

A Yes, sir.

Q And Plaintiff's Exhibit 153 is what?

A That's our request for additional concession beyond the normal dealer price discount.

Q All right. And you requested on this transaction – well, what were you – just tell me about the transaction. What were you bidding, and what was your request?

A Let me do this a little bit differently. There's 146 and 125. So that would be 273 total. And the reason why

they're split into two columns is the first column, if you see those tiny little numbers on line 12. We wanted 48 of them the fourth quarter of 1998; 98 of them the first and second quarter of 99. And we forecasted that they would be 1999 models. And then based upon the customer's request for delivery. The 125 is broken out as 100 the third and fourth quarter of 99, plus 25 for the first quarter of 00. So we felt it was necessary to portray this in this fashion to the factory so they could make the proper decisions. And then as is normally the case, we showed them what [236] price level we were using. You know, we were using April data. And the concession request I felt 13 percent was required to be competitive on this deal due to my conversations with the customer. And then the rest of that is information that came back from the factory. You want to go through that down there?

Q Well, let's cover it. What information on this transaction did you actually provide to the factory?

A I wanted them to be aware that there was no financing obligation for Volvo to consider. There were no trades to consider and that they had to be spread out in such a way that we would not receive more than five per week. In other words, it was going to be a tightly-controlled schedule. And I advised the factory that they had recently purchased 15 Freightliners and 15 Navistars. And I gave them the information about the fleet size and how many were Volvos and when we expected them to accept bids and the fact that Freightliner and Navistar was the competition; That it was all class eight account. That's what that 100 percent means. There's no, you know, smaller trucks counted in that number. And then the normal stuff, funding source, customer, in AOR, yes, to indicate to them that it was in my area.

Q What is this information here that appears on the concession request?

A That's a notation that came at the same time as the nine and a half percent approval on the first column and the seven perçent [237] approval on the second column. And that was a two percent scribbled out with two and a half scribbled up above. And I'm having a hard time reading that one. I think it says escalator, but, you know, your guess is better than mine, based on a dealer net for model year 2000, units to be built by 12/31/99. Any changes, blah, blah, blah, are going to be paid for by the customer, escalators to be calculated on dealer net. So that's a way of advising us that the 2000 models as compared to the 1999 models should have a two and a half percent price escalator. But I, on the face of that I was very confused, because I thought the two and a half percent was already reflected in the reduction and concession. In other words, the nine versus the two and a half, nine and a half versus two and a half is seven. I'm getting scrambled. I'm sorry. But like I say, I was a little – I believe I called to get it straightened out.

Q Okay. This quotation of TSL showed up on, of course, Volvo's records in its record called a new retail quote as of May 28th of 98, is that right?

A Do you see it there? There it is. Oh, is that May 28th? Is that what you're asking?

Q Yes.

A Yeah, that's what that says. So it's down there at the same time.

Q Down here also on Volvo's records there's Trans States Lines and one of them shows 9.5 percent and one shows 7 percent.

[238] A Yeah. It's the 146 and the 125. That's our deal.

Q Okay. Now – and yours was May of 98, your request?

A That's right.

Q May 26, 98.

A Right.

Q Take a look at what's been admitted as Plaintiff's Exhibit 154. What is this?

A You asked –

MR. WILLIAMS: Your Honor, just a moment. We object to any testimony about this document. We have, you know, it's admissible, and, but this individual, this witness has no personal knowledge and there's no foundation for it.

THE COURT: Where did this document come from?

MR. BYARS: This was produced to us by Volvo –

THE COURT: In discovery?

MR. BYARS: – in discovery. VTNA 1324 is the discovery number.

THE COURT: Have you seen other documents like that from Volvo?

A Other ones like that?

THE COURT: Yeah, like that one?

A I've seen several.

THE COURT: I'm going to let him testify. I think he can testify to his interpretation because of what he is and what he's done and Volvo records he's reviewed of what he thinks it [239] means. You can cross examine him. You're overruled, and you may answer.

A I forgot the question. I'm sorry.

Q Well –

THE COURT: I think I did, too, but let him ask it.

Q This says – the document 154 says special price confirmation, doesn't it, at the top?

A This, this – if we are talking about what is this form?

Q Yes.

A This is a special price confirmation of a slightly different format as the one we had been accustomed to using. I've seen perhaps three different variety – varieties of these in my time as a Volvo dealer that we have used. We standardized on the one that we used. The factory or Volvo appeared to have no problem with it. We thought it gave us enough room to tell the story we wanted to tell and reminded to us include the information at the bottom that was required, and to some extent my sales people were familiar with the use of this form, so we used this form. This other form would be the same type form that results in concession being granted for whatever deal they turn in. So as far as that goes, that's the difference, format.

Q So this is a request that was submitted to Volvo by another dealer –

A Yes.

Q – on TSL –

[240] A That's correct.

Q – from Charlotte, North Carolina?

A That's what it says.

Q And that was for VNL 64 T –

A Right.

Q – 610's –

A Yes.

Q – and with a concession request of 14.5 percent –

A That's right.

Q – and a concession approved at 11.7 percent.

A Right, and a similar notation.

Q Yeah. Let's look at the notation here and compare that to what appeared on yours. If you'll just read that.

A It says two percent escalator based on dealer net for model year 2000 units to be built by 12/31/99. Any specifications or product improvement will be added to dealer net, so that part's all the same, but the two percent is different, and it doesn't appear to me –

Q On yours it said 2.5 percent.

A Yeah, the two percent was taken out and two and a half was added. And the –

Q Tell us what the escalator meant. That means it would go up by 2.5 percent?

A Yes. When they were – it says based on dealer net for model year 2000, so, so if the dealer net was $50,000, if it was [241] going to be built as a 2,000 model, what they're saying is that it's going to be 50,000 or $51,000. That would be two percent I guess, isn't it?

Q All right.

A I'm getting puzzled here over the numbers.

Q Well –

A It's $1,000. It would be $51,000 as a 2000. And they're reserving the right, if there is Government-mandated equipment or anything else that that has to be paid for. So I bid it to the customer. I say if there is a requirement for 2,000 that's not in here, we're going to have to go up on the price for the value of that special equipment.

Q Okay.

A That part is the same, not the percentage.

Q What competitive information or this other information that you included on your request does not appear on Exhibit 154?

A There's no information as to what the competition is. That would be down towards the bottom. Are you able to see that below Suzanne Warren's? There's no indication of the fleet size. There's no indication of how the trucks are

to be paid for. The pricing, you know, the 56,238 is the same. The 16 –

Q You're looking at this right here –

A Yes, I wrote on it.

Q – compared with what yours was?

A Yeah. Ours was 56,238; theirs was 56,238.

[242] Q All right.

A But then the optional content, their options are 16,461. I'll just try that. And our options were 16,555. So there appears to be a ninety-dollar difference in the interpretation of what the customer's specification was, but it is the same deal.

Q Bottom line is this Volvo dealer out in Charlotte got 11.7 percent and you received 9.5 and seven percent?

A That's right.

Q Who owns that dealership out in Charlotte?

A Terry Young.

Q Who is Terry Young?

A He's a dealer principal. He had been a Volvo factory employee, much the same as I was a GM employee, but he was the president.

Q Let's take a look now at Plaintiff's Exhibit 155 and 167. I'm sorry. Let's first begin with Exhibit 155, and what is this, Bill?

A That's our concession request for a potential sale to Land 'O Frost, a customer in Searcy, Arkansas.

Q And, what were the quantity of trucks you were seeking to bid to sell to this customer?

A Now, this is an alternate. This is five VNL 64 T 660's or as an alternate five VNL 64 T 610's. This customer is extremely weight conscious. They haul lunchmeat in a refrigerated trailer. Weight becomes a very important issue and these two trucks have a [243] slightly different weight.

Q And your concession request was what?

A Six percent.

Q And what was approved?

A Two percent. There's some notes in the comments that would support the competitive situation.

Q You gave some additional information about this quote to Volvo?

A Yes.

Q Now, let's take a look at Exhibit 156.

A Yes.

Q Is this a copy of an invoice from Volvo to Southwest Missouri Truck Center in Springfield, Missouri?

A Yes.

Q And we are dealing with – this was an invoice reflecting a sale of 1999 model VNL 64 T's, is that right?

A Yes. And this is a point in time when again the 610 was not reflected as part of that model number. It's back on a later page. These are 610, so it would be the second comparison.

Q Now, take a look at Exhibit 156-A. The invoice shows that to this dealer they were going to resell to B & D Produce, correct?

A The truck was ordered on behalf of B & D Produce.

Q Sold by Volvo to the dealer, of course?

A Sold to Southwest Missouri Truck Center who indicated that B [244] & D Produce was their intended customer.

Q And there were – well, this Exhibit 156-A is a copy of a printout we received from Volvo indicating the number of trucks in this deal?

A Yeah.

Q And there appear to be six?

A Six.

Q And what was the concession granted to this dealer on that transaction?

A 4.9 percent.

Q And what is the date that that dealer ordered the trucks?

A March 20th, 1998.

Q All right. Let's move ahead to –

A Joe, that's a difficult comparison as well for the jury to understand. There's a different price level on those.

Q On the Land 'O Frost?

A Yes. Postmark date of March 1998 created a higher dealer net.

Q Right.

A Or lower, actually. The trucks are a thousand dollars difference in price to start out with. So we would have to do a lot of calculations to level it out, and I don't care to.

Q Now, we've got a number of other comparisons on this transaction. Can you locate one where?

A I'm sorry, Joe.

[245] Q Where I'm not messed up on it?

A All right.

THE COURT: Land O' Frost, is that a refrigerator-type unit or something?

A Yeah. Yeah, baloney and salami and that's what they make.

THE COURT: Cold cuts?

A You bet. 1,700,000 pounds a week.

Q That's my fault.

A That's the way it goes. Could we refer to 155-A, Joe?

Q These are, 155-A are additional documents produced by Volvo in discovery. And there are a number of pages, if you'll refer me to a page number . . .

A You could look at 9131 and ask me what questions you want. I mean, you know the VTNA number?

Q All right. From this document are you able to make a comparison for the Land 'O Frost transaction?

A All I can do is look through there for 610's and the quantity of five and see one for four percent, and, and one where the ring binder hole is, two percent as ours is, and so on.

Q Okay. There's one VNL 64 T 610, five units, four percent?

A Right.

Q And there are – comparing the same number of units and there's one of the two units at 13.1 percent. We've got another – is that yours? Rigg Transportation, 5.2 percent.

A See, Joe, the difficulty is the page 9129.

[246] Q Right.

A That's where our deal would be reflected –

Q Okay.

A – I think. Let's go on.

Q Next let's look at Exhibit 168. (Off the record briefly.) What is Exhibit 168, Bill?

A That's a letter from Jerry McNair to Bill Heck dated August 26, 1998.

Q And what does that have to do with?

A That has to do with a potential sale of highway tractors to ABF Freight System.

Q All right. And how many tractors were contemplated being sold in this deal?

A I believe it was five to 600. I have some records I could reference.

Q All right. And what amount of discount were you authorized for on this deal?

A 13.9 percent. It's the second bullet underneath my name.

Q Okay.

A You have a highlighter. Sure.

Q R S A?

A Yeah. The other name, Retail Sales Allowance, Concession, Same thing.

Q This was August 26th of 1998?

A That's right.

[247] Q Now, let me refer you to Plaintiff's Exhibit 169, and this says order board as of August 13 of 98. You know what the order board is?

A Yes.

Q What does that mean?

A That's the trucks that had been ordered that have not been produced and there's a footnote that leaves out trucks that have zero concessions before February 1st, and it leaves out credit; in other words, trucks they can't build because there's no financing arranged by the dealer, and to be cancelled. In other words, before you cancel a truck, you have to get it out of the schedule so it's what they're going to build.

Q And your bid on these ABF trucks in 98 was for the VNM 42 T model?

A As I recall. I believe that's right. I don't have that document in front of me to tell you for sure, though.

Q All right. Hang on. (Pause) Let's go on. We will try to locate that document here. Let me show you this Plaintiff's Exhibit 169, if I could make this to where everybody could see that, there were – on the order board as of August 13, 1998, VNM 42 T, 462 trucks at a concession level of 16.2 percent. Is that correct? Is that what that document shows?

A Yes. And that document would indicate a cumulative value, not a – that's not a single order for 462 trucks at 16.2 concession. That's an order board that –

[248] Q That would be the average concession for that many trucks?

A That should be.

Q All right. As compared to what you were granted on this proposed deal to ABF of 13.9 percent?

A That's correct.

Q Let's take a look at Plaintiff's Exhibit 171?

A Joe?

Q Yes?

A I have a deposition document.

THE COURT: Listen. You may just want to respond to the question, though, that he asks. If you just

start making statements or if you start asking questions, I'm going to have to swear in Mr. Byars maybe.

A I'm sorry. I apologize.

THE COURT: That's okay. No, just – But when he asks a question, answer it and if you need to take a break or if you need to consult with him, well, you can do that.

A I would request that.

THE COURT: Mr. Byars, I think your client wants to talk with you. Why don't you just stand down, go down? You can visit with him out there, and if it takes longer than just a minute or two, tell us and we'll all take a break.

(Off the record at this time.)

THE COURT: We ready to go back on the record?

MR. BYARS: Yes, Your Honor. We have located [249] Plaintiff's Exhibit No. 229.

THE COURT: Okay, sir.

MR. BYARS: We would move for the admission of that document.

MR. WILLIAMS: Just a moment, Your Honor, if I might. All right, Your Honor. No objection to 229.

THE COURT: Admitted without objection as 229?

MR. WILLIAMS: 229, yes, Your Honor.

BY MR. BYARS:

Q Bill, I had earlier showed you Exhibit 168, and that was your – that was a letter showing you what your concession approval was of 13.9 percent.

A Yes.

Q And what is Exhibit 229?

A That is my actual bid.

Q That's the letter where you sent your bid to ABF?

A That's correct.

Q And that reflects that you were bidding on the VNM 42 T?

A That's correct. That confirms that. And it shows the volume 500.

Q 500 units?

A That's right.

Q Reflecting the price in light of your concession approval?

A Yes.

Q Were you able to get that deal?

[250] A No.

Q Let me show you what's been marked as Plaintiff's Exhibit 171. What is this document?

A That's a concession request dated December 21st, 1998, for a potential sale to Carco Carrier Corporation in Ft. Smith Arkansas.

Q All right. And does this represent some attempt at some new business for you?

A Yes.

Q Who was the salesman on that deal?

A Ken Plemmons.

Q And was Ken Plemmons one of your salesmen that you hired in 98?

A Yes, he was; yes.

Q Okay. And this was for 60 units, is that right?

A That's right.

Q Model No. VNL 64 660?

A There's an error. It should be VNL 64 T 660, but it shows a VNL 64, which doesn't exist.

Q Okay. And the amount requested was 12 percent?

A That's correct.

Q And you received 10 percent?

A That's correct.

Q All right. Information provided to Volvo about this deal?

A Yes.

[251] Q This would have been a Conquest account?

A Yes. Never have sold them a truck.

Q And the funding source is listed as Bank of the Ozarks, is that right?

A Yes.

Q So there's no funding or financing burden on Volvo?

A Or Reeder-Simco.

Q Or Reeder-Simco? And the competition or the primary – had a fleet size of 650, is that right?

A Yes.

Q And so they previously had been sold the Navistar line of trucks?

A At that time.

Q All right. Now, if I could have you look at Exhibit 172 . . .

A Yeah.

Q Is this a copy of a Volvo invoice on a sale to the Volvo dealer known as Great Southern Volvo of Jackson, Mississippi –

A Yes, it is.

Q – for the model 2000 VNL 64 T 660's?

A Yes.

Q And what concession amount was received by this dealer?

A Eleven and a half percent.

Q And this transaction involved how many trucks? I'm showing you Plaintiff's Exhibit 172-A.

A 15, 15.

[252] Q All right. Now, you were bidding on 60 trucks in December of 98 on that Carco Carrier transaction?

A That's right.

Q And I want to show you a document produced by Volvo in discovery. It says new retail order detail as of January 7 of 99. And there it is. Does this document reflect that there were – there was a sale, an order of 60 trucks VNL 64 T for S A I A Motor Freightline at 18 percent.

A Yes. Joe, that is a different model number.

Q I'm sorry. We are looking at VNL 64 T 660?

A Yeah. What – where are we?

Q We're on Plaintiff's Exhibit 173.

A It would be higher up on that chart. You can find the 660's.

Q Yeah, on the first page here we located that. We've talked about the Fastway Systems, 11.5 percent.

A That's correct. That's what that reflects.

Q And the Land/Air Transport, 114 percent? (sic)

A Yes.

Q MGM Transport, ten units at 11 percent.

A Sure.

Q UPS Truck Leasing, 25 units at 13.1 percent.

A Yes.

Q And now right here we're looking at – see the notation which says one next to these transactions?

[253] A Yes, I see that.

Q What does that indicate to you?

A Well, this is a retail quote list. At the same time they put it on the retail quote list they got the order.

Q So those transactions resulted in sales?

A Yes.

Q Is that your understanding?

A Yes.

Q Let's take a look at Plaintiff's Exhibit 174. What is this document?

A This is our special price confirmation request dated February 19th, 1999.

Q And who was the customer on this deal?

A In God We Trust Trucking, I G W T.

Q How was that contact made?

A Ken Plemmons was out looking for new business.

Q All right. And the quote was for ten units of VNL 64 T 610's?

A Yes.

Q The request was 10 percent, is that right?

A That's correct.

Q Approval at 5 percent, is that correct?

A That's right.

Q Now, let me have you take a look at Exhibit 175. Is this a copy of an invoice from Volvo to Westfall Volvo in Kansas City [254] for the sale of a 2000 model VNL 64 T 610's?

A Yes. I would mention one other thing for clarity.

Q Yes.

A Ken was not yet understanding the difference between asking for the price of the truck at net and list. He knew the difference between that and list, but he used the list to ask for it. To him it didn't matter. We eventually got him to change. You'll notice the chassis price on that invoice is 87,761. Do you see that on line 20, Joe? Line 20, 81,761 compares to our same chassis of 81,761. It's just that both of those would be list instead of net.

Q Okay. You're looking here on the invoice column of 81,761 and on your concession request, that's what appears?

A Yes.

Q And so we are looking at the same chassis, same price level?

A Same price level; that's correct.

Q And this other Volvo dealer received 13 percent concession on this deal?

A That's right.

Q And that was on a sale to Farmland Industries. And how many, how many trucks were sold on that transaction?

A 14 or 15, 14.

Q Okay. You were looking at selling 10?

A Yes. Yes.

Q Let me show you Exhibit 176. Is this another copy of a [255] Volvo invoice to Southwest Missouri Truck Center, Springfield, Missouri, for the sale of a 2000 model VNL 64 T 610's, same price, same –

A Sure. Postmark date 12/8/99. It is an invoice to Southwest Missouri Truck Center in Springfield, Missouri.

Q And when I say the same price here, I'm not talking – that's not the final price. We're not talking about final price, because concession percent obviously affects that.

A Right.

Q Those are shown over here on this next page. So the concession affects obviously the price to the dealer.

A As well as the options.

Q All right. And 176-A reflects how many trucks were involved in this transaction?

A Ten.

Q Ten. And this dealer received 10.6 percent concession? And was able to make the sale?

A Yes. He received 10.6 and this is the invoice.

Q I have 183 on this comparison, but we are going to – we just – we are going to leave those Exhibits, Your Honor, for the jury to look at. I don't want to go through them. But those have been admitted I understand.

THE COURT: Well, they have been admitted, but I think there probably ought to be some identification or tying down of them before they –

[256] MR. BYARS: All right.

THE COURT: I have problems when we introduce an Exhibit and nobody mentions anything about it and it goes back with the jury.

MR. BYARS: I understand.

THE COURT: At least have them identified.

MR. BYARS: Okay.

BY MR. BYARS:

Q Bill, Exhibit 177, is that an invoice to Westfall Volvo where that again was the sale of 2000 VNL 64 T 610's?

A Yes. And the same postmark date range –

Q All right.

A – Westfall Volvo and GMC in Kansas City, Missouri.

Q And this is for the sale of how many trucks?

A It would indicate five.

Q Okay. And this dealer received 13 percent concession?

A That's correct.

Q And if we look at the invoice marked as Plaintiff's Exhibit 158, is that an invoice from Volvo Truck for this other Volvo dealer, Hughes Truck Center?

A 178?

Q Yes, 178.

A Yes.

Q All right. And for the sale of how many trucks?

A That's five as well.

[257] Q Okay. That's a 5.5 percent concession.

A Yes.

Q And Plaintiff's Exhibit 179, is that an invoice from Volvo to another Volvo dealer, General Truck Sales and Service –

A Yes.

Q – for the same –

A Yes, sir.

Q – the same, again, the same model?

A Yes.

Q Same chassis?

A Right, pricing the same.

Q Pricing on the same –

A On the base, on the base model.

Q But this dealer received a 6.3 percent concession on the sale?

A Yes, sir.

Q And this would involve the sale of how many trucks? Actually there was six. 6.3 on five and then the dealer got another seven-point –

A There's a mixture here. For some reason there's a difference in concession. This is a ten truck deal. Five of them have 6.3 and five of them have 7.1. I could not tell you why they're different.

Q All right. But they are both more than the five. Again, looking at Plaintiff's Exhibit No. 180, is this an invoice to all [258] Volvo and GMC trucks concerning the sale of the same, same truck model, same pricing?

A Yes.

Q And this dealer received a 7.5 percent concession?

A That's correct.

Q Next is Plaintiff's Exhibit 181. Is that an invoice from Volvo to another Volvo dealer, Tulsa Trucks, Inc, regarding a transaction for Melton Truck Lines, same model, same pricing?

A Yes. Joe, the pre-previous one was ten trucks. I don't know –

Q Okay.

A I'm sorry. I don't know –

Q We had how many trucks contemplated?

A Ten.

Q Right. This dealer received an 11.5 percent concession?

A Yes.

Q And if you look at the back page of this invoice to this other Volvo dealer, there's an additional says a concession adjustment?

A Yes.

Q Does that reflect an additional concession?

A Yes, it does.

Q So if we look at Exhibit 181-A, what this dealer got was a total of 13 percent concession?

A That's correct.

[259] Q And this involved the sale of how many trucks?

A Ten.

Q I've almost forgot now what you – you received a five percent approval concession?

A That's right; five.

Q And Exhibit 182 is a copy of an invoice from Volvo to General Truck Sales and Service reflecting the sale of a 2,000 Model VNL 64 T 610, same pricing in effect. This dealer received seven percent concession?

A Yes.

Q And this involved the sale of how many trucks?

A Six.

Q Finally Exhibit 183?

A Joe?

Q Yes.

A I have to have a meeting with him, I guess.

THE COURT: Why don't you approach the witness this time?

A I apologize.

THE COURT: He apparently has a question.

(Off the record at this time.)

Q Look back at Exhibit 182. On the first part of the invoice appears that this other dealer got seven percent. Right there on the back page of that invoice is an additional concession of $707, is that right?

[260] A $707 additional, that's correct.

Q And so the total concession that dealer received on the six trucks is 7.9 percent?

A Right. That illustrates how much a small percentage can change the price of a truck. That's $700 for .9 percent.

Q In the margins you deal with on these sales of trucks, in your experience does $700 make a difference?

A Yes, it does make a difference.

Q In looking at Plaintiff's Exhibit 183, is that a copy of a Volvo invoice to this other Volvo dealer, June, 1999, same pricing in effect?

A That's correct.

Q And this dealer received 9.5 percent concession?

A That's right.

Q Involving how many trucks?

A Ten trucks.

Q All right. We've just compared your transaction for I G W T to Exhibits 175 through 183, is that correct?

A Yes. We got done with the 183.

Q All right. Now, let me have you take a look at Exhibit 184. What is this document?

A This is a special price confirmation dated 2/25/1999 for Arkansas Refrigerated Lines, ARL.

Q Was this new business, new potential business for you?

A Yes.

[261] Q And Mr. Plemmons was trying to cultivate that account?

A Yes, sir.

Q And that involved the sale of ten, potentially the sale of ten VNL 64 T 610's?

A That's correct.

Q 1999 model?

A Yes.

Q And the concession request was 10 percent?

A That's right.

Q And the authorization was four percent?

A That's right.

Q This was then changed to 4.7 percent, right?

A You're referring –

Q Referring to the next page on Plaintiff's Exhibit 184.

A That's Suzanne Warren's notation, 4.7 percent.

Q All right. And then to 6.9 percent, is that correct?

A Yes.

Q And this was for the sale of 10 VNL 64 T 610's, the 1999 models in February 1999?

A That's right.

Q Document 184-A lists other retail quotes as we received from Volvo?

A Well, yes, it does.

MR. BYARS: Your Honor, could we approach one more time just real fast?

[262] THE COURT: Yes.

A Joe, could you come here real fast.

Q Sure. (Off the record briefly.) What does Exhibit 184 reflect, Mr. Heck?

A 184 is our original concession request for ARL approval of four percent.

Q I'm sorry. 184-A?

A I'm sorry. 184-A is a weekly summary of the retail quotes that were given out by Volvo for the week of March 4th.

Q The week following your requests to ARL?

A That's right.

Q Actually, it's the last one would have been within that week, wouldn't it?

A Well, one before and one after, I think.

Q Okay.

A No. When Suzanne Warren approved it to 4.7, it would have appeared in there. You betcha. There's one in there; yeah.

Q Okay. And the top line of this document says that would have been 64 T 610's, and that shows the month quarterly of 573 units?

A Model quantity.

Q Model quantity as of that date is the total there?

A Yes.

Q And the average concession on those was – note that model was 10.9 percent as of that date.

[263] A Of the quotes given out the week ending 3/4.

Q All right.

A Or the week of 3/4.

Q Let me show you what's been marked as Plaintiff's Exhibit 185. What is that document?

A That's a request. That's a special price confirmation request dated April 13th, 1999, for Carman, a local account.

Q All right. And is that new business for you or had you sold them before?

A I sold them back in the early nineties, maybe 93 or so. You know, the previous models of Volvo, not the VN's, certainly.

Q All right. And did you assist Mr. Plemmons in doing this request?

A I worked with him on it.

Q All right. And what was the amount of the concession that you believed was necessary to get the deal?

A Six percent.

Q And what was the amount of concession approved?

A Three.

Q And you received that approval on April 14th of 99?

A Yes.

Q And that was – these were for some VNL 770's?

A Yes. This would be VNL 64 T 770. There's only one 770.

Q And you were looking at the potential sale of 15 of those?

A That was – that is correct.

[264] Q All right. Now, if you'll look at Exhibit No. 186, that says new retail quotes as of April 15 of 1999, and your quote appears at this line, doesn't it, for Carman, Inc., VNL 770?

A Yes. It's in the middle of the group.

Q And for 15 trucks?

A That's right.

Q Concession at three percent?

A That's right.

Q And right beneath that is another Volvo dealer on the same model, the 12 trucks, beer trucks, that they received 4.1 percent?

A That's right.

Q There's another retail order detail. Now, that's a retail order detail which means that there would have been a sale, is that correct?

A Yes. That indicates orders as opposed to quotes.

Q That's as of May 13th of 99?

A Yes.

Q And does this document reflect a sale to another Volvo dealer of 770 model, 12 units, where that dealer received a 7.5 percent concession?

A That's correct.

Q Now, Exhibit 187, is this a copy of an invoice from Volvo to another Volvo dealer, RDO Truck Center in Dallas, Texas –

A Yes.

[265] Q – for the sale of the VNL 770's?

A Yes, sir; Dallas.

Q And that dealer received a seven percent concession?

A That's correct.

Q And how many trucks were involved on that transaction as shown on Exhibit 187-A?

A That would be ten.

Q Seven percent concession?

A That's right.

Q I'll have you take a look at Plaintiff's Exhibit 191. What is this document?

A This is a special price confirmation request dated April 14th, 1999 –

Q All right.

A – that I submitted.

Q And who was your customer or potential customer on this deal?

A USA Truck in Van Buren, Arkansas.

Q And had Reeder-Simco previously sold to USA Truck?

A Yes.

Q And what are the quantities involved and the different models involved in this transaction?

A Okay. The way to understand this is that you start out on the left. There's 563 model VNL 64 T 660's. Because the customer operated a model Freightliner, that would be more [266] comparable to that model, or I was attempting to give them an alternative where they would have 66 of those for the applications where they needed it. That

would be a nice team truck for two people to drive. And then 497 610's, which is which is better for a one – which most of their fleet is one river. So you can see it's a deal for 563. It's just two different combinations of trucks. And the concession was approved at 14 percent without regard to what the model was or the option pricing. We requested 25 percent.

Q Same concession across the board.

A Yeah.

Q And did you provide Volvo with all of the information concerning the deal that you could get?

A Yes. I – right, exactly.

Q And what – you rated the probability of getting the deal as a seven?

A Yeah, at 25 percent.

Q And how many – this was a manufacturer or a trucking company that had been purchasing Freightliner in recent years?

A Yes, sir.

Q And –

A Recent to this date.

Q The funding source was going to be the customer?

A That's right.

Q So there wasn't any financing issues on this deal, was [267] there?

A There was no finance issue.

Q All right. Let me show you Plaintiff's Exhibit No. 192. Is this a copy of an invoice from Volvo to another Volvo dealer, Ozark Truck Sales in Springdale, Arkansas, with respect to a transaction a sale to PAM Transport, Inc?

A That's correct.

Q And that was with regard to 2000 VNL 64 T 660's, is that right?

A That's correct.

Q This is on your first column of 563 units?

A Yes.

Q And this dealer received a 14.5 percent concession?

A Yes.

Q And this – other dealer also had some dealer funds available, is that right?

A Yes, sir.

Q When you're looking at the sale of 563 units and there's a difference in .5 percent on the concession level, what does that mean in terms of dollars and cents –

A To the customer?

Q – in the transaction?

A To the customer?

Q To the customer or to you?

A To me? Okay. At different of .5 percent?

[268] Q .5 percent?

A Okay. On the VNL 64 T 660, that would be 76,610. That's $215,000, $657 difference to me and it would be higher than that to the customer –

Q All right.

A – because of the federal excise tax.

Q Now, let me show you what's been marked as Plaintiff's Exhibit No. 193. Is that a copy of an invoice from Volvo to another Volvo dealer, General Truck Sales and Service in Memphis on the sale of the same model trucks?

A Yes. These are the 610's.

Q 610's?

A Yes.

Q And look at Exhibit 193-A. What was the concession amount granted to this other dealer for these trucks in June of 1998?

A Joe. This is not a fair comparison.

Q Okay.

A We're a year off.

MR. BYARS: Your Honor, let me just withdraw that 193?

THE COURT: 193 or 193-A?

MR. BYARS: 193 and 193-A.

THE COURT: They will be withdrawn.

Q Let me show you what's been marked and admitted as Plaintiff's Exhibit 194. These are other new retail

quotes as of April 22nd of 1999. And is that your bid that shows up right [269] here?

A Yes. That would be the 563. Right.

Q And concession amount of 14 percent?

A That was the approved amount.

Q And then we had this other quote that was approved for Estes Express involving 30, and they also got 14 percent.

A That's right.

Q In the concept of granting concessions, which makes sense, to grant a higher concession on a 563-truck deal or on a 30-truck deal?

A All other things being equal, the 30-truck deal should get less than the 563-truck deal.

Q All right. With respect to – there's a sale here or a quote indicating that that was a one transaction?

A Are we on 194?

Q Yes, 194.

A Okay.

Q With five trucks at 15.7 percent concession. That's correct?

A Yeah; that's correct.

Q Then there's another down here quote Land/Air Transport, a ten-truck deal, 14 percent.

A That's right.

Q Other quotes as of April 15 of 99, to First Fleet VNL 64 T 610's, quantity 25 at 16.6 percent, quantity of 40 at [270] 16.6 percent, correct?

A Yes.

Q Last one. Looking at Plaintiff's Exhibit 195, tell me about this one, Bill.

A Its our special price request dated April 8, 1999, for Love Box Company up in Springfield.

Q Had Reeder-Simco sold to this company before?

A No, not Love Box; no, sir.

Q So this would be a new business prospect for you in April of 99?

A That's right.

Q And what were the models and the year model and the trucks to be sold?

A These would be 2000 model what was called a WG 64 T.

Q And looking to sell four units, you requested six percent concession, is that right?

A That's right.

Q And three percent concession was granted –

A Yes.

Q – on this transaction?

A Right.

Q This customer had a fleet size of 30? The funding source was Bank of the Ozarks?

A Right. It's a Mack account.

Q And this request was in April of 99. Let me show you. This [271] is what's been marked as Plaintiff's Exhibit 196. Is this a copy of an invoice from Volvo to Ozark Truck Sales, Springdale, for the 2000 model WG 64 T –

A Yes.

Q – where this dealer was given a concession of seven percent –

A That's correct.

Q – and resulting in a sale of Volvo to that dealer? Of course, the dealer's the customer. How many trucks were involved in this transaction that's shown on 168-A?

A 196-A perhaps?

Q Yes.

A Ozark Truck Sales, one truck, seven percent concession.

Q And the date of that was March of 99, right?

A That's right.

Q Exhibit 197, is that a copy of an invoice from Volvo for a sale made to Great Southern Trucks of 2000 model WG 64 T's?

A Yes, sir.

Q And this dealer received a 6.5 percent concession?

A Yes. Well, it's hard to tell. 197-A says 7.42, and I believe that this later data is more accurate of the two data sales. This is June 1st, 2001, data. It was verified.

Q And this was – the postmark date on this was December of 99?

A That's correct.

[272] Q Now, even though it's December of 99, now, on your – there's no – there's no pricing differences at the same price level as your quote in April of 99, is that right? Your chassis we are looking at is 69,776, and as shown on I guess this was the Plemmons matter. He showed 69,776, which is the –

A Yeah. That was just Ken, you know. He –

Q That's – the dealer list is the same, so that indicates the same pricing level?

A Right. When you net it out, it's $55,820.80, so it's the same number. It's just the different representation. It's a list instead of net.

Q All right. Thank you.

MR. BYARS: Your Honor, I'm about to move into another area.

THE COURT: We are going to move out of this area for about 20 minutes, long enough to take a break to about a quarter till 3:00, but remember the prior admonitions of the Court not to discuss this anyone nor allow anyone to discuss it with you. We are going to remain seated until you're out of the room. Have a nice break and we'll see you in 20 minutes.

(Off the record at this time. The following proceedings were had outside of the presence and hearing of the jury:)

// THE COURT: Anything anybody wants to put on the record with the jury out of the room? It's 3:25? I would like probably – I don't think you guys have had a break since lunch,

* * *

[274] [Deposition Testimony of Hugh Samuel Johnston, read into the record on January 15, 2002. Located *infra* at JA 391 through JA 405.]

* * *

[Testimony of William E. Heck (resumes)]

[280] BY MR. BYARS:

Q Bill, yesterday we heard a limited mention of your meeting with Stan Boris, and I'd like for you to explain the circumstances of that meeting and what was discussed.

A Mr. Boris arranged the meeting with David Reeder and David asked myself then Hershel to participate because we are all owners, and as the meeting took place, Mr. Boris asked David if he could speak to him privately and David said, well, of course, Bill and Hershel are also owners of this business. And Stan Boris proceeded to tell us of an interest on the part of MHC of Kansas City to buy our dealership.

Q All right. And then what was your reaction?

A We were quite surprised, and, you know, we, we at that time had not thought or were interested in selling the assets of our dealership.

Q All right. And did you ever receive after that time any type of an offer?

A No, sir.

Q All right. Did this meeting occur prior to the Marco Island meeting that was described in March of 1998?

A Yes, sir.

Q In 1999 did Reeder-Simco receive a termination letter from Volvo?

A Yes, sir.

Q That was admitted yesterday as Exhibit No. 54, which we read [281] in the courtroom yesterday. Remember that?

A Yes, I do.

Q And what was your reaction upon receiving that letter?

A At first we were, we were very upset. David received it. It was addressd to him and he called me over and he asked me to read it, and we sat down and tried to, tried to figure out what to do.

Q All right. And what were you thinking about doing at that time?

A Well, we had two choices. We could let time flow and at a point in time we would not be a Volvo dealer, or we could decide to not take it and not take the defeat and go ahead and do what we could to remain a Volvo dealer.

Q All right. Do you believe you were terminated as a dealer?

A Yes.

Q Do you currently have a franchise agreement with Volvo?

A No, sir.

Q Let me show you what has been marked as Plaintiff's Exhibit No. 289. What is this?

A That is a dealer directory published by Volvo for the year 2000. That's what it is.

Q All right. And what's the purpose of that directory?

A It's so customers can locate a dealer for the purpose of parts and service and repairs on the truck.

Q And is Reeder-Simco published in the 2000 directory?

[282] A No, sir.

Q Bill, from your experience at General Motors, did you have occasion to be involved in the purchase of dealerships, selling of dealerships?

A I was involved to the extent – I was involved.

Q All right. And explain just a little bit about your involvement in that.

A I would assist in sometimes bringing two parties together where one person might be interested in going out of the business so to speak so as to retire and he needed to, you know, get some value, and then the new party needed to be made aware of the potential that the franchise would make available to them in their area.

Q And at GM you also had the opportunity to run the operations of a dealership, is that right?

A That's correct.

Q And when was that?

A 1980, 80, 81.

Q And that's prior to you going to Reeder-Simco?

A Oh, yes.

Q And in that experience were you involved in the sale of heavy trucks?

A Yes.

Q And how long have you had experience in the area of heavy truck sales?

[283] A Since 1976.

Q As a business owner and operator, what information is important to you in evaluating the going concern value of a franchise such as the Volvo franchise you had under the 1995 franchise agreement?

A As an owner, I wished to evaluate the amount of money it's producing, its earnings, its profits.

Q You have an understanding of present value and future value financing concepts?

A Yes, sir.

Q Bill, with regard to these objectives that were set by you, set by Volvo to Reeder-Simco, put them up here, the objective numbers that were assigned for new truck

sales, did you have a problem with those objectives as they were set?

A Not with the objectives themselves with the exception of 1997 where I did ask them to reduce it a little and they did agree and I thought there was a different problem with the objectives.

Q All right. Well, what was the problem with the objectives?

A I was unable to obtain them because Volvo was not functionally giving me the same discounts as they were to other dealers, so I felt if my objectives were being set on the same basis as other dealers, I should have the same pricing base to compete.

Q And so you believe that the numbers set, but for the conduct [284] of Volvo, were reasonable objectives?

A Yes, sir.

Q But given the circumstances, they weren't reasonable?

MR. WILLIAMS: Your Honor, I think they're leading now, and asked and answered as well.

THE COURT: Well, I think it has been asked and answered, but you can rephrase your question. Your objection will be sustained.

Q Let me move on. Bill, what was the heavy truck sales market doing in 1998 and 1999?

A It was well on its way to achieving all-time record volume.

Q What was happening to the lead time at Volvo to get orders out?

A It was becoming more and more extended. It took longer. Lead time is the amount of time between when you order the truck and when the truck is built and shipped to you, and it was getting longer and longer.

Q Okay. Well, explain a little bit about the lead time. What do you mean? When you order a truck for a sale, just explain a little bit about what's meant by that?

A Well, the plant only has the ability to build so many vehicles a day. And they can't change that rapidly. They have to stay at a certain pace. And when I visited the plant during these periods of times with fleet customers, I could see that more people were being hired and more people were being trained [285] and the daily production rates were growing higher and higher, and in spite of that, the lead times were getting longer and longer where we might be able to obtain a truck in 60 to 90 days in the case of Lane Freight, we saw it was 150 days between the time we ordered the trucks and when we got them, and that was not a request of ours.

Q And what does that tell you about the capacity of the Volvo plant during that timeframe?

A It told me that the plant was being operated at its capacity and they were taking steps to increase the capacity as rapidly as they could. I saw them moving processes out of the plant for example where they could, you know, change it to a final assembly and not so much subassembly.

Q And how does that mesh with this concept that a loss sale to Reeder-Simco was a loss sale to Volvo?

A Well, I would say it certainly reduces the expense to Volvo of a loss sale for Reeder-Simco because they were pretty much building all they could at that period.

Q Does Reeder-Simco prepare detailed operating reports on a monthly basis?

A Yes, sir.

Q Okay. What is the operating report?

A It's based on the General Motors Standard Accounting System and it tracks our expenses, our sales, creates profits, keeps track of the assets and the liabilities. It creates a balance [286] sheet and an income statement so to speak.

Q And is there a standard format for the financial statements?

A That's what I'm – that's what I meant by the General Motor Standard Accounting Format.

Q And are these submitted to General Motors on a monthly basis?

A Yes, they are. Yes.

Q And is there some mechanism whereby those same operating reports are also sent through GM to Volvo?

A Yes. I can only understand. I don't know the technique. I know that I report to General Motors and Volvo receives those reports.

Q What information concerning heavy truck sales is included in the operating reports?

A On a monthly basis, the number of units that were billed out that month, the gross sales value, the cost of sales, the resulting gross profit, and the average gross profit per unit which is the volume divided into that, and then there's a running total kept for year-to-date, so you have month and year-to-date for heavy trucks, and it's broken down by model somewhere.

Q And have you reviewed all of Reeder-Simco's operating reports since 1990?

A More the annuals. From time to time I would have interest in a monthly report, but I've reviewed the annuals more than the monthly reports.

[287] Q And in preparation for your testimony in this case, have you prepared a summary of the operating reports?

A Yes, in a limited way.

Q All right. Let me hand you what's been marked as Plaintiff's Exhibit No. 268. Tell us what this is, please?

A This is a recap or a summary of our operating reports containing a year, total units sold, Reeder gross profits on those Volvo sales, and our average gross profit per unit.

MR. BYARS: Your Honor, we move for the admission of the summary of the operating reports, Plaintiff's 268.

THE COURT: We think it it's already in evidence, came in on Monday, 268.

MR. SHANNON: That's what my records show.

THE COURT: Let's make sure the one we've got is the one you're using though, Mr. Byars, before you put it up.

MR. BYARS: Sure. I need some assistance getting this thing working. (Off the record at this time.)

THE COURT: You know, when I first started practicing law, you could even smoke, jurors, you know, and judges smoked during the trial, but we've come a long way. So . . . but, Miss Porter, if you need – if you've got a bottle of water or whatever you need, you sure can. It's kind of dry in this courtroom too and I think that does help. We were making progress and then –

MR. BYARS: My foot just hit the little button down [288] here.

MS. PORTER: Okay. Its just takes a minute to reset. (Off the record at this time.)

THE COURT: This equipment does – as many Exhibits as we have or are going to have, this saves several days of time I assure you of passing them back and forth. It's marvelous equipment. It's expensive equipment, but we do from time to time develop a glitch and we apologize for that. Let's go back on the record and go ahead and continue. Thank you, Mr. Byars.

BY MR. BYARS:

Q Mr. Heck, Exhibit 268 is now on the overhead, and on the column it says Reeder gross profit, and the gross profit figure is per year or listed, is that right?

A That's right.

Q Listed on there?

A That is correct for Volvo.

Q Now, what is gross profit? What are you calling gross profit in that column?

A In this sense, this is the difference between the sale price and the cost of sales, which includes what we paid for the vehicle and various other expenses.

Q Well, does it include interest expense on your fleet sales?

A On the majority of fleet sales it does, the great majority.

Q So the interest on fleet sales has already been netted out when it comes to your cost of sale, is that correct?

[289] A In most cases I order it on the invoice of the truck.

Q What about insurance?

A Insurance is not included in that.

Q Okay. So that would be an additional expense item that would need to be netted out of the gross profit?

A Yes. Insurance is $30 per vehicle.

Q Okay. That basically covers you until when you get the trucks in until they can be shipped back out, is that correct, on your floor plan?

A Right. The purpose of the insurance is to protect me while the truck is in my control.

Q Sure. I was just wondering why it would only be $30 per truck?

A Because ordinarily the trucks – I can't afford to have them stay around. I have to bring them in. Get them in the hands of the customers, pay the trucks off. And the $30 is a high average. Many of these trucks would be slightly lower, but it's not worth it, you know, it would be $25.

Q All right. Are the sales commissions expense included in your cost of sales?

A No, sir. On my sales there is no sales commission. I'm not a commissioned employee. When the salesmen did participate in a fleet sale or a stock sale, and they were commissioned, we would calculate their commission, but it would not be included in these figures.

[290] Q Okay. And so in coming up with the net profit, that would be expensed out?

A If we were to create net, you would have to take that out.

Q All right. Well, what are the other items that are included in your cost of sale, deductions I guess from the what I might call the gross profit? They are already included in this figure?

A By cost of sale, again, it starts out with what we paid the factory for the trucks. That's where it starts. Then anything we do for the truck, if we have to put $20 worth of diesel fuel in it, so it doesn't run out of fuel while it's in our possession, the $20 goes against the truck. Any fluids that are added to it that are not reimbursed by the factory, any repairs that are necessary that are not covered under warranty, any delivery expenses, if I pay somebody $20 to drive it to a customer or $300 to take it to Houston, those are included in that figure. Anything that I can assign, I

know I spent it on that truck, that's how our accounting system works.

Q So all of those figures have already been taken out and what's left is this gross profit figure?

A Yes. It's not strictly the difference between the sale price and the factory invoice.

Q And have you prepared a lost profit estimate quantifying what element of damages were caused by Volvo?

A Yes, I have.

Q Let me refer you to Exhibit 272. Have you identify that.

[291] A This is a chart I put together and it uses years 96, 97, 98 99, 2000. It lists various objectives, various information to come up with a sales projection of lost profit.

Q And where did you obtain the information that is set forth on Exhibit 272?

A Well, the various, the sales objectives came from what objectives we were given by Volvo. The Reeder sales came out of our financial statement. The difference is just math. The Reeder average gross profit came out of our year-end operating reports. The lost gross profit is the difference between our objectives and what we actually sold. The Volvo dealer average gross profit was obtained in two stages. We asked questions of Volvo and they gave us material back and indicated what the average dealer gross profits were in a form that involved different models. And so I took our model sales experience and adjusted those

numbers using their numbers to get a weighted average and I came up with a Volvo dealer average gross profit.

MR. BYARS: All right. Your Honor, we move for the admission of Exhibit 272.

MR. WILLIAMS: May we approach the bench, Your Honor?

THE COURT: Yes, you may.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

THE COURT: You moved the admission of 276. I think it was 272 that you meant.

[292] MR. BYARS: I'm sorry, 272.

MR. WILLIAMS: Your Honor, let me turn it around for the Court. This damage calculation includes 1996 and if it comes in at all, I think it has to be subject to a limiting instruction because the damages shown on here are under the franchise practices act.

MR. BYARS: We're going to get into that. We are going to adjust that in form. We plan on doing that. We're going to have the figures adjusted for February of 97 and then the separate one from after February of 96. This is just to give us the basic numbers and then we're going to make these adjustments here in Court.

MR. WILLIAMS: Well, it's an Exhibit. That's why I raised –

THE COURT: Do you have an Exhibit 272-A or B that would –

MR. BYARS: No. We are just going to show how we come up with the adjustments to come up with the numbers.

MR. WILLIAMS: Your Honor, there's a prejudicial effect here by putting this in and then just orally doing it. I think we ought to have a –

MR. BYARS: We will do it in writing. We're going to make notations to develop a 272-A and 272-B. This is sort of the foundation material from which we are going to show how we're making the adjustments.

[293] THE COURT: Well, I don't know how to let it in unless we do use a limiting instruction at this point. Do you have a preference on A, B or C? We ought to have these tatooed someplace.

MR. SHANNON: C is going to be the closest.

MR. WILLIAMS: Well, actually even C is not correct because it talks about the incident is on the issue of liability or bad faith, so I think it goes only to damages.

THE COURT: Well, what if then –

MR. BYARS: We can deal with it.

THE COURT: What if it's admitted but they are instructed they're not to consider anything for the year 1976?

MR. BYARS: 1996.

THE COURT: Yeah, 1996.

MR. BYARS: Well, the problem with that would be that going back four years from February 2000, 96 should be included for Clayton Act purposes.

MR. WILLIAMS: But not January.

MR. BYARS: No, that's right. And we are going to make that adjustment.

MR. WILLIAMS: Well, Your Honor, I think the judgment would be before we get to Court and put two numbers before the jury. I think it's prejudicial to the defense.

(Off the record at this time.)

MR. BYARS: In the jury instructions –

[294] THE COURT: I can handle the jury instructions. I'm worried about that exhibit. What about you may consider only 11 months, the last the last 11 months of 96 for the Clayton Act and then it's not to be considered at all under the Arkansas Franchise Practices Act?

MR. BYARS: No – oh, for 1996?

MR. WILLIAMS: That's what he said.

MR. BYARS: And then you may only consider the values for Arkansas Franchise Act following 11 months –

MR. WILLIAMS: February 9th.

MR. BYARS: – from February 9th of 1997.

THE COURT: Okay. We think we are going to have a deal – are we going to have anymore of these that may be – you know, I feel better about this –

MR. BYARS: This is the basic one that we are going to use to develop – I mean we're not going to use any more –

MR. WILLIAMS: Your Honor, I think they have got some others. They have got to clearly include 96 in the calculations.

MR. BYARS: We are not going to use those.

MR. WILLIAMS: Not going to use those?

MR. BYARS: No.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Ladies and gentlemen of the jury, with reference to Plaintiff's proposed Exhibit No. 272, I'm going to [295] admit that exhibit. It contains some information concerning several years to include the year 1996. This is a Limiting Instruction and I'm telling you that, although it reflects 1996, only the last 11 months of 1996, that is, everything but January may be considered by you in connection with the Plaintiff's claim for price discrimination under federal law. And under the Arkansas Franchise Practices Act, none of 1996 that you're going to see can be considered by you in arriving at damages. So with that Limiting Instruction, you may – I am admitting Exhibit 276 – 272.

MR. BYARS: Thank you, Your Honor.

Q All right. Bill, what I'd like for you to do is with reference to this chart we've got for year 1996, the sales objective set by Volvo was 89 units, is that right?

A Yes, sir.

Q And the actual sales was 66.

A Yes.

Q So the difference between the two was 23 units?

A That's right.

Q Does this column here show the average gross profit per unit based on your actual 66-unit sales?

A Yes, it does.

Q All right. And so this column here where it says lost gross profit?

A Yes.

[296] Q That's simply 23, the difference times your average gross profit that you made on these 66 units, is that correct?

A That's exactly how that's done.

Q All right. And you did the same for each of the following years from 97 to 2000. The sales objectives here, actual sales, the difference, multiplied by the average profit based on your actual sales to come up with the lost gross profit figure, is that correct?

A That is correct.

Q Now, with regard to the year 1996, the calculation includes the full year, as it shows here on 272.

A That's 12 months.

Q So we need to take out a month, don't we?

A Sure.

Q And would you do that calculation so we can adjust the number?

A Yes. If we do it on a total basis, one-twelfth of the 57,684, is $4,807. That would be one month.

Q So the 57,684 needs to be reduced by the figure you just mentioned?

A By 48.

Q And what was that –

A Excuse me.

Q 57,684 is reduced by the number you just mentioned?

A Right, which is one month worth.

[297] Q Right. And so what is that number?

A 4,807.

Q And what's 4,807 minus 57,684 or 57,684 minus that number?

A 52,877 is the resulting figure.

Q All right. Now, this column to the right, what does this column represent?

A That is the number calculated based on information we received as a result of our questions where I adjusted it for our actual sales experience to create a model balance. Some of those years had models difference.

Q All right. And what I'm going to do is I'm going to refer you now to Plaintiff's Exhibit No. 211, and are these the – are these Volvo's answers to our questions?

A For that question set, I think, yes.

MR. BYARS: All right. Your Honor, we would move for the admission of Exhibit 211.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: And that's an interrogatory to Volvo and their Response?

MR. WILLIAMS: Yes, Your Honor.

THE COURT: It will be admitted without objection, 211.

Q The question we asked Volvo was please state the dollar amounts of the average gross profit per truck by model, if available, for all Volvo dealers for each of the years, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001. In connection with [298] this interrogatory Mr. Patterson stated at page 60 and 63 of his deposition that the gross profit figure per truck is approximately $3,500 for the year 2000. Please provide these gross profit dollar figures for each of the years requested. The information received is shown here on the Response where they're listed here on Response to Interrogatory No. 2 for Volvo.

THE COURT: Mr. Byars, you can make that a little larger, but be careful not to unhook anything.

Q The models are shown here on the left of these columns, and for example, for the VNL model series, the gross profits per year are shown here and here. And is it your understanding that, Mr. Heck, that that represents the average Volvo dealer's gross profit per unit for those years and that model?

A Yes. That's my belief.

Q All right. And so in coming up with your – the information on the chart here on 272, what does – how did you come up with these numbers here for what the other Volvo dealers' gross profits were?

A Again, I took what we sold and created a model mix that would be available in our territory. And I used the different models that were on that chart you just had up there and I weighted them based on our sales of different models, so if I sold half of one model, I used – I weighted the average for that model half and I multiplied it and then divided.

Q All right.

[299] A It's a weighting.

Q So for 1996, for example, Volvo lists the average gross profit per dealer here, and based on the model which you sold during the models you sold during that year, your figure represents the weighted average of their answer?

A Yes. It was based on the WIA figure, if you would move your chart down a little bit so we can see them, see WIA and then you go over to 1996 and it's 2797. So I took the number of WIA's we sold that year and applied that value to those, but then we sold some other vehicles that had – must have had more average gross profit and it caused the weighted result to be 2807 as opposed to 2797, a minor difference, but I wanted to be consistent for every year and not, you know, do it different.

Q Okay. And so there's a, for example, if we look at the Reeder average gross profit for 1996, your gross profit per unit was 2508, yet the average other Volvo dealers' gross profit was higher?

A That's right.

Q Is that right?

A That's right.

Q Same for 1997, where your average gross profit was 2353, And the other dealers' average gross profit was 3,209.

A That's right.

Q And for 1998, your average gross profit was $3,019 and the others were 3,171.

[300] A Right.

Q And yours was actually higher in 1999, your average gross profit versus the other dealers, and why is that?

A There's very little fleet sales reflected in that $4,000 average. We were not able to be successful in fleets, so the fleet lower averages were not within our average.

Q And your average gross profit for 2000 is lower than the average Volvo dealer's gross profit?

A Right.

Q Well, what would that mean, why was – why was your gross profit lower? Do you have an explanation for that?

A I believe we weren't able to receive the same discounts as we went through yesterday. That's part of it.

Q So as a result you were knocking down your profit?

A Yes.

Q We could make the adjustment here. And finally over here in this column, this lost gross profit. These profit figures are simply that they were calculated in the same manner as this column, but utilizing the Volvo dealer gross profit, the average other dealer's gross profits, is that right?

A Yes. The difference figure is simply multiplied by the Volvo dealer gross profit as opposed to Reeder-Simco's gross profit.

Q Okay. And so that number, if you utilize what the other dealers were getting as their gross profit, the bottom number [301] jumps up to $731,927.

A Yes.

Q This needs to be adjusted as well to take out a month.

A The amount that we need to remove is $5,380.

Q Okay. And what's the result?

A 59,181.

Q All right. Now, you had a $30 insurance charge per truck?

A Correct.

Q And based on the difference here, you would have had to take out the $30 for each of these units?

A Yes. I would, I would need to reduce the gross profit figure by that, if we wanted to obtain a more net figure.

Q I'm going to write insurance down here and what is the total, what is the total amount?

A $6,330 would be the total of all of those differences at $30 each.

Q In addition, the gross profit figures do not include the sales commissions expense, does it?

A That is correct.

Q So let me have you look at Exhibit No. 278. What is that?

A That's a summary of the salesperson's commissions that were paid during the same period of time.

Q All right. That's a listing per year?

A Yeah.

Q All right.

[302] MR. WILLIAMS: I'm sorry. What number?

MR. BYARS: 278.

Q And this would have been for the stock truck sales by –

A Primarily again, I'm not a commissioned salesperson.

Q Right. And so – Your Honor, we move for the admission of Plaintiff's Exhibit 278.

THE COURT: Any objection?

MR. WILLIAMS: Not at this time, Your Honor.

THE COURT: It will be admitted without objection.

Q If you would, Bill, we've got this broken down by year. What is the total? This is for 1996 through 2000. Would you add the total, the totals up, please?

A Just take it . . . 21,607, if you round it; $21,607.

Q Now, Mr. Heck, if you would adjust the totals based on the change for 1996, what are the results?

A The 696,718 figure becomes 691,911 with the January number removed.

Q All right. And for the other column?

A It becomes 726,547 with the removal of $5,380 for the month of January.

Q Okay. And then we have – you take out these two numbers, to give a net figure, reduce these two numbers from those totals.

A Okay.

Q What do we have?

A 663,974.

[303] Q And the other?

A Pardon me?

Q This column here?

A Oh, is that 726,547? Is that where we're starting?

Q Yes. (Pause)

A 698,610.

Q Say that again?

A I'm sorry. 698,610.

Q All right. Now, under the Court's Instruction, the Franchise Act, we cannot consider 1996, is that correct?

A That is correct.

Q So I'm marking this as Plaintiff's Exhibit 272-A, and – but what I would like to do is do the same exercise of removing the one month in 1997 from these two numbers. Okay. The new number for –

A Do you want the new number for 1997?

Q Yes.

A Is 53,923.

Q And the same for this other column here?

A 73,540 would be the new number.

Q All right. Now, if you would, total these four columns.

A Can you read me that top number, Joe? I don't want to make a mistake.

Q Yes, 53,923, 132,836, 276,241, 171,132.

A The new number would become 634,132. And we're working on [304] lost gross profit designed as our basis I believe, right? Yeah.

Q Check that again, Bill. 53,923, plus 132,836, 276,241, and 171,132.

A 634,132.

Q Now, this other column you would add 73,540, 139,524, 251,317, and 196,300.

A 660,681.

Q And, again, taking out the insurance and commission expense what are the – what's the total of these two?

A Okay. We're starting at 66397.

Q You want to total this, these two numbers, and then we'll reduce the next chart by that?

A That would be easiest; yes, that would be best. That result is 27,937.

Q And reduce these two numbers by that?

A Okay. Starting with 634,132, the reduced figure is 606,195.

Q And for the other column?

A Can you move it over so I can see that number?

Q I'm sorry.

A 660,681.

Q Right.

A Subtracting 27,937. That resulting figure is 632,744.

Q See 632,744?

A 744.

MR. BYARS: Your Honor, we move for the admission of [305] Exhibit 272-A?

THE COURT: Any objection over and above what we have already stated?

MR. WILLIAMS: Other than what we've already stated, Your Honor, over those objections . . .

THE COURT: It will be admitted.

Q Bill, when you sell new trucks, new heavy trucks, what does that do to your parts and service revenue?

A Well, it improves that in proportion to the increased sales volume.

Q These calculations did not include any of the additional revenue or loss pertaining to your parts and service revenue, did it?

A No. It does not include that whatsoever.

Q Was there – by reduction in sales, is there some reduction in the parts and service revenue –

A Yes.

Q – and profit?

A Yes, because your brand new vehicles are not coming in to be worked on or having parts put on them.

Q We have not put any amount in that calculation. You're not asking for that?

A Correct, not in the damages. I can't. I don't know how to do it.

Q What is the problem here?

[306] A We used the General Motors Standard Accounting Format and it does not separate the service and parts and body shop activities

Q As Volvo?

A It's just total. You know, as a business person, I'm not so concerned with what part I sold, just that I sold the part.

Q All right. And so the operating reports in your accounting records do not separate out Volvo parts and service from GM Parts and Service, is that correct?

A Not at all. It doesn't separate it at all.

Q All right.

A That is correct.

Q So you could not make those calculations?

MR. WILLIAMS: Your Honor, I object; asked and answered.

THE COURT: I'm overruling it. He may answer it again. I don't think he answered it in that form.

A Could you repeat the question?

Q Well, was it possible for you to come up with a calculation based on that loss?

A No.

Q With regard to these gross profit figures we've mentioned, that does not include a general reduction for your general overhead, does it?

A No.

Q Okay. What pays for your general overhead?

[307] A The parts and service predominantly pays for that.

Q All right. Is there any difference in your fixed cost overhead when you sell ten trucks versus one more truck?

A No, sir.

Q You've got that no matter what?

A It's going to be there.

Q Well, what we have attempted to do is take out all of the expenses related to your heavy truck sales and we've come out with these net profit, lost profit figures based on the information we had, is that correct?

A That's correct. I believe there's one more component.

Q Okay. And what's that?

A Advertising to be totally fair.

Q Okay. All right. The advertising expense, what is that? What does that typically run you on an annual basis?

A Slightly over $2,000 after we take out the funds that Volvo provides. This is strictly Volvo, not our total advertising.

Q So that's on a per year average?

A Yes.

Q And so for the 19 – well, for the calculation under federal law, we need to net out another five years at

$2,000, we need to net out another 10,000 for the advertising expense, is that correct?

A Yes.

Q And with regard to the – you help me with the calculator [308] here. We've got one, two, three, four years. Two years, $8,000?

A 8,000 works.

Q Just help me net that out real quick.

A 598,195. If you move it over, Joe, we can see it.

Q I'm sorry.

A 624,744.

Q You've got a lot of vehicles in stock, Volvo heavy trucks in stock?

A Yes.

Q And when were those ordered?

A They were ordered in the – ordered in – they were ordered in the Summer of 98, late summer.

Q All right. And of those vehicles ordered at that time, how many have you – well, how many were ordered?

A Somewhere between 35, possibly 38.

Q What year models do you have still in stock?

A They are 2000 models.

Q Have you been able to sell those?

A We've had difficulty with the ones that are left.

Q How many are left?

A Nine.

Q All right. And have you incurred interest expense on those trucks?

A Yes.

Q And that's an additional – you consider that an additional [309] element of damages?

A Yes.

Q Let me hand you what we've marked as Plaintiff's Exhibit No 277. Tell me what that is.

MR. WILLIAMS: What was the number?

MR. BYARS: 277.

A This is a listing of potential sales with a statement of lost profit.

Q All right. How did you prepare that document? What was that based on?

A That's based on the quotations, and a reasonable expectation of what our profit level should be based upon what our profit experience was for the same years for that model.

Q All right.

A Or sales actually, so the numbers should tie together.

MR. BYARS: Your Honor, we move for the admission of Exhibit 277.

THE COURT: Objection?

MR. WILLIAMS: Your Honor, may we approach the bench on this?

THE COURT: Yes.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. WILLIAMS: Your Honor, just to make sure I understand it, to make my record, I thought Mr. Byars had said in [310] our previous bench conference that the only damage figure he was going to put in was the calculation, was the one he's just completed, and I'm not sure where he's going, so I'm not sure if I can frame my objection.

MR. BYARS: Your Honor, this is really not a calculation. This is sort of a support for our calculation. I mean this is – this shows what the potential was. We've just made the calculation, but we want the jury to understand what the potential was out there and why our figures are reasonable.

MR. WILLIAMS: Okay. So you are not – if I may ask, Your Honor –

MR. BYARS: We're not asking for that bottom figure to be awarded as a damage figure. This is offered in support of our calculation.

MR. WILLIAMS: And there's not – is there not going to be an alternative damage calculation based on the 300 sales per year?

MR. BYARS: That's correct.

MR. WILLIAMS: Okay. Okay.

THE COURT: Do you have an objection?

MR. WILLIAMS: No, Your Honor. I think these are – I think these are quotes that were given, so I don't know that I have any objection.

MR. SHANNON: He went through the numbers.

MR. WILLIAMS: Yeah, I think he did. I think he went [311] through these yesterday, so, no, Your Honor, I guess now that I understand where he's going, I don't object.

THE COURT: How much longer you going to be?

MR. BYARS: As soon as we leave this, we will go on to his opinion of the loss of the ongoing concern value of the business.

MR. WILLIAMS: Okay, Your Honor, that's something that we probably ought to go ahead and raise now. It's apparently they're going to want to submit to the jury and ask for both lost profits and the loss of the ongoing concern value, and that's double dipping. We've got authorities on that and we want to address that, and we can address that at a separate bench conference or perhaps at our break with the jury, but we don't think they can get both.

THE COURT: Yeah. Why don't we go ahead and let's go ahead, and as I understand 277 is going to be in without objection.

MR. WILLIAMS: Yes.

THE COURT: Let's go ahead and get to it, and then before you start with the other, we will take a break,

and then I think you may want to leave him there, and then let's go into that because I –

MR. BYARS: All right.

THE COURT: – and once we get – assuming you're permitted to do that, how long will it take? How much longer is [312] he going to be on the stand by you?

MR. BYARS: I think that will be close to it.

THE COURT: Well, close to it.

MR. BYARS: Well, I mean I – I think that's going to be it. I really do. You may be real surprised, but I think that's –

THE COURT: But – and if you are permitted to, how long will it take, you think, to get in that testimony, just one Exhibit or –

MR. BYARS: Now we don't have any documents on that.

THE COURT: Just going to do some testimony?

MR. BYARS: What we might do is demonstrate – you've seen me do this before with the – with writing out some numbers showing support for what numbers he gives for that.

THE COURT: Okay. Let's get this part of it and we'll take a break and then I'll let you guys take a break too and that we'll come back in. I've got concerns about where you're going or attempting . . .

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: I'm admitting without objection 277.

Q Mr. Heck, this exhibit you've prepared begins with potential sales you had in 1997, 1998, and beyond. As far as your calculations for 1997, in 1997 this does not include all of your lost potential sales, does it?

[313] A No.

Q Were the records that have been produced in the lawsuit – these are the numbers for 97. Had you gotten all of these sales, the profit potential there for 97 was 946,765, is that correct?

A We had the potential to do that getting this business. I'm sorry, yes.

Q And for 1998, we talk about a lot of these, the Beach Trucking, well it should be Southwest Financial, I believe, shouldn't it?

A Yeah. I don't recognize Sweet. That's – yes, you're right.

Q Danmarr Transit, REC Transport, DSL, ARL, Lane Freight, Land 0' Frost, ABF, Carco Carrier. The 1998 potential was $2,117,051?

A Yeah, we had the potential to do that.

Q And the 1999 potential what we're looking at you've got In God We Trust Trucking, ARL, Carman, Inc, USA Truck, Love Box Company, Hiland Dairy, Marrlin Transit, ABF, USA Truck, the 1999 potential was $1,538,903 with a potential for those years of $4,602,719, is that right?

A Yes.

MR. BYARS: Your Honor, I believe we are going to go into that other area now.

THE COURT: Ladies and gentlemen, I think we are at a

* * *

[319] Defendants kind of time to get –

MR. BYARS: Sure.

THE COURT: – to regroup.

MR. BYARS: Sure.

THE COURT: Ready to start?

MR. BYARS: Yes, Your Honor.

THE COURT: Let's bring the jury in.

(Off the record at this time. The following proceedings were had within the presence and hearing of the jury:)

THE COURT: You-all have a good break? Can you see why we don't have a lot of disturbances in Federal Court? Continue.

MR. BYARS: Thank you, Your Honor.

THE COURT: Mr. Heck, again, I remind you, sir, you're still under oath.

A Yes, sir.

THE COURT: Mr. Byars?

BY MR. BYARS:

Q Bill, as a business owner of Reeder-Simco, have you come up with an estimate of the going-concern value of the Volvo franchise as of after February 9th of 1997?

A Yes, sir.

Q All right. And what is your opinion of the on-going concern value of the Volvo franchise portion of your overall business?

A $1,200,000.

Q All right. And what was the basis for your opinion? How [320] did you – how did you come up with that number?

A I took steps to separate the Volvo profits, the share of the total business profits that we could assign to Volvo with the records that we had and used those separated out profits in an earnings model is the best description.

Q All right. And you utilized the operating reports of Reeder-Simco to arrive at that calculation?

A That's correct.

MR. BYARS: Your Honor, we move for the admission of Plaintiff's Exhibits 261, 262 – I'm sorry – 258, 259, 260, 261, 262.

THE COURT: Are those annual or monthly or –

MR. BYARS: These are – these include all of the monthly operating reports for each year.

THE COURT: 258 through 262.

MR. BYARS: Yes.

Q Were these either prepared by you or at your direction or business records? Is this part of the business records of Reeder-Simco?

A Yes. These are the – this is the General Motors Standard Accounting Report that we receive from General Motors after we send them a trial balance, sir.

THE COURT: Okay. Any objection?

MR. WILLIAMS: Okay. Your Honor, Mr. Byars didn't give us copies. If you'll just give us just a moment to get copies, [321] we don't have an objection so long as I have a copy I can have in front of me as well.

MR. BYARS: Your Honor, we did produce these, produced them early on in discovery.

MR. WILLIAMS: Yeah, but they're just not in the Exhibit volume. I was just wanting to make sure I have a copy.

THE COURT: I'm going to admit them without objection, but I will give you time to find them, Mr. Williams.

MR. WILLIAMS: Thank you. (Pause) Your Honor, it appears we have 93 through 2000. We don't have 92. 2001 which are within the ones Mr. Byars refers to, we don't have copies of those.

THE COURT: Do you have an extra copy you could make available to them?

MR. BYARS: We could make one available. These are so voluminous we did not reproduce them again to produce to Volvo. We had previously produced since 90 to Volvo.

MR. WILLIAMS: I don't believe we got 2001. I think we got the other, but I think that's –

THE COURT: Well, I'm going to admit them, but at the break we'll permit you ample time to either have copies made or you may use the Court's copy.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: Go ahead, sir.

Q Let me take a look at the 1996 report. Show that. This is [322] generally what 262 looks like, and as the first step in your calculation you first took the new Volvo gross profit figure for 1996, is that right?

A On page three. That's correct.

Q And that number appears right here, doesn't it?

A If that's line 28, that's the number we're looking for.

Q Right, line 28. And that's 165,499. All right. And what was the total gross profit with regard to all other new vehicles?

A That would be reflected on line 50 of that same page.

Q All right. And so the other vehicles gross profit is 637,452?

A That's correct.

Q So that's Volvo and this would be the other. And what's the total here?

A $852,951. That's the total vehicle gross profit.

Q That's the total vehicle gross profit, and so utilizing these two figures, did you arrive at a percentage of what the Volvo sales bears to the other new vehicle sales?

A Yes, I did, sir.

Q And what is that? What's the percentage?

A I'm coming with it. 20.61.

Q That's 20.61 percent related to Volvo sales?

A Roughly a fifth.

Q Now, what were the total 1996 earnings of the business? Where would that be reflected? And actually what you used was [323] the net earnings after deducting all expenses, is that correct?

A That's correct.

Q Is that shown here on page one of Exhibit 262 for 1996 where it says here –

A I can't – Joe, that's the only the month. I think I need to see the year.

Q This is, this is the year ending December 31, 1996?

A Right. That's the line we're using. This is line 55.

Q All right. And that total is shown here as the year-ending total. That's the net earnings of 920,832?

A That's correct, sir.

Q So the net earnings is 920,832. Now, what is 20.61 percent of the total net earnings for 96?

A $189,783.

Q And that would be the net earnings utilizing this formula attributed to the Volvo portion of the overall business of Reeder-Simco Truck Center?

A In proportion to the new truck sales.

Q All right. When you look at that where the gross profit on the sales of new vehicles was 165,449, and you compare that in proportion to the total net earnings, what does that tell you?

A That tells me that the business makes money in other areas such as used trucks, parts service, and body shop that are not reflected in just the sales gross profit.

Q Okay.

[324] A The same thing is said of the total gross profit for sales. It is less than the net earnings.

Q Well, in coming up with your total value of 1,200,000, explain how you do that.

A. All right. This is an earnings model. We go back for a five-year period to determine an earnings figure that can be attributable to the Volvo franchise. The Volvo franchise is an intangible asset. It allows us to make value with our other hard assets. It's intangible. All right? So we go back five years and we create this model of these net earnings attributable to the Volvo level of business, and we take that number and we divide it by five.

Q All right. That gives you the average net earnings over – the actual net earnings over the previous five years?

A That's correct, sir.

Q And that will give you a number to which you can apply a multiplier?

A That's a fact.

Q And we talked about Mr. Johnston had multipliers that he gave in his testimony yesterday?

A Yes, sir.

Q Do you know of multipliers that are also used in this industry?

A Yes, I do.

Q And what is the actual multiplier you believe would have [325] been utilized in 1997?

MR. WILLIAMS: Your Honor, may we approach the bench?

THE COURT: Yes, you may.

MR. WILLIAMS: Thank you.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. WILLIAMS: I just want to restate so my record's clear on this that – and I think where Mr. Heck is going, he's now trying to qualify as an expert under Rule 702. I think this clearly is expert testimony and he is not qualified as expert in this, and we've said those grounds in our previous motion.

THE COURT: And I think as a business owners and someone who's been involved in a business, he can. I

thought he was going to testify about the value of the business and before and after all of this happened.

MR. BYARS: Yes.

THE COURT: All of this is somehow relevant to that?

MR. BYARS: I want to show how we come up with this figure, with the earnings.

MR. WILLIAMS: I think it's an expert methodology which he seems to be adopting after his deposition.

THE COURT: Well, I think these are reports apparently he generates or is generated by his company I think every month and they are sending – I think it's something he probably is familiar with and I think I'm going to permit him to testify from [326] it. You may cross examine.

MR. WILLIAMS: Okay. I understand. I just want to make sure of my record.

THE COURT: I understand and I want you to make sure –

MR. WILLIAMS: Thank you.

THE COURT: – you're covered.

MR. WILLIAMS: Thank you.

(The following proceedings were had within the presence and hearing of the jury:)

BY MR. BYARS:

Q What earnings multiplier are you familiar with as being used?

A For that period of time, five.

Q Okay. So what we've got here on the board is we've got the first year, the year end of 96 earnings figure for Volvo, and you took a five-year average of each of these going back, the historical actual earnings, and in 1995 what was the Volvo new sales gross profit?

A 1995 Volvo gross profit is 181,166.

Q And what was the gross profit attributable to all of the other new sales?

A 764,761.

Q And the total there is 945,927?

A That's correct, sir.

Q And for this year what percentage does Volvo sales relate – [327] how does that relate to the overall net earnings?

A 19.15 percent.

Q All right. And so we use this. That's basically 181,166 divided by this number. That's what it is, isn't it?

A Yes, that's what I did.

Q Okay. Now, what was the total net earnings of the business for 1995?

A Line 55 is $1,334,619.

Q Okay. And you're obtaining that from the operating report?

A I'm reading it off of it; yes. Yes, I am. I'm sorry.

Q Let me just do that. I've misplaced my pen now. I'm sorry. That was what?

A The net earnings figure?

Q Yes.

A Line 55 is $1,334,619.

Q And what is 19.5 percent of this figure?

A 19.15 percent of that number is $255,579.

Q So that would be the earnings related to Volvo?

A Yes.

Q Net earnings Volvo is this number here?

A No, that number you're writing down is wrong.

Q Not correct. I'm sorry. 255,579.

A Yeah.

Q That's the number for 1995?

A That is correct, sir.

[328] Q And, again, the gross sales, gross profit on the Volvo Trucks is again less than the proportion to the net earnings.

A Yes. As is total gross profit to total net.

Q So that number again shows you that you've got additional earnings from parts and service.

A Yes.

Q Let's do the same for 1994. What was the new Volvo sales gross profit in 1994?

A The same. 1994. Yes, sir. $169,215.

Q And what were the gross sales from all the other vehicles?

A Gross profit, sir, is 633,510.

Q For a total of what?

A 802,725.

Q And so based on the net earnings after all expenses, what is the amount attributable to the Volvo franchise? Is it 21.8 percent?

A 21.08.

Q 21?

A .08.

Q .08. percent?

A That's correct.

Q So what are the earnings attributable to Volvo for that year?

A Again, we would take 1 million.

Q Now, what you're about to give me is your net earnings [329] figure for the entire business, is that right?

A Sure, line 55.

Q Okay. And that's 1 million?

A Just write 1,025,935.

Q And then 21.08 percent of that is?

A 216,267.

Q So that would be the earnings figure for 1994 attributable to Volvo?

A That's correct.

Q Okay. 1993, you just give me those figures for 1993 earnings. What was the amount of the new Volvo sales gross profit?

A 83,205.

Q And gross profit from the sale of all other vehicles?

A The gross profit attributable to other vehicles is 523,227.

Q And that total?

A 606,432.

Q And so what percentage is the Volvo franchise compared to the gross profit?

A 13.72

Q And what was the total net earnings after expenses for the business?

A $818,875.

Q And what's 13.72 percent of that?

A 112,350.

[330] Q So that figure there is the Volvo earnings figure?

A For 1993.

Q For 93. And we've got four years. We've got – you take the average of five, is that right?

A Yeah, we needed one more year.

Q And for 1992 what was the total gross profit on Volvo?

A Total gross profit on Volvo that year was $563,582.

Q And what was the gross profit on all the other vehicles?

A Other?

Q Yes.

A Is $484,602.

Q What is that total gross profit on new sales?

A 1,048,184, 1048184.

Q And what was the gross sales of Volvo, what was the percentage for that year?

A 53.77.

Q All right. And then you take from your operating reports the total net earnings after expenses for the business, is that right?

A Yes, line 55.

Q And what was that?

A 1,312,579.

Q And what is 53.77 percent of this figure?

A 705,774.

Q Okay. And that would be the earnings attributable to Volvo [331] for 92, is that right?

A Yes, sir.

Q Now, if we add these up and come up with the average earnings for the five years prior to 97, take 705,774 –

A Seven?

Q – 705,774, plus 112,350, plus 216,267, plus 255,579, plus 189,783, and then you divide that by five to get the average earnings, which is what?

A $295,951 is the average.

Q Say that again?

A 295,951.

Q 295,951 is the average earnings for the five years

A Right.

Q And this is where the multiplier comes into play?

A That's a fact; yes.

Q And you believe it's five times?

A Yes, sir.

Q And what is that number?

A I should have agreed to the earlier number. The way we round it, it's $1,479,755.

Q One million, 479?

A 755.

Q 755?

A Yeah. That's the actual number.

Q And that would be under this earnings model, the value of [332] the business as of the end of 1996?

A The value of the Volvo franchise intangible asset would be this.

Q All right. And as of February the 10th of 1997, what was your opinion of the total value, the going-concern value of the franchise, of the Volvo franchise as of that time, 1,200,000?

A Yes. Actually 1,250,000. I misspoke before.

Q All right. Why didn't you use the $1,479,755? Did you also consider just the Volvo gross profit?

A Yes.

Q And you made – did you make a calculation using the Volvo gross profit?

A If you only used the gross profits from the Volvo sales, which excludes any possible profits from parts, service, used truck and body shop, that similar number would be a million one something.

Q All right. And you took the average of those two roughly –

A Yes.

Q – to come up with your opinion of 1,250,000?

A Right.

Q All right. Today do you have a Volvo Franchise Agreement?

A No, sir.

Q Were you terminated as of March 1st or March 31st of 2000?

A Yes, sir.

Q What is your opinion of the ongoing-concern value of the [333] Volvo franchise as of March 31st, 2000?

A Zero.

Q And why is that?

A I had nothing I could transfer to a potential buyer.

Q And you have an opinion as to the value of it today?

A I believe today's value is also zero.

Q And why is that?

A We're in this lawsuit and I don't know the outcome.

Q Just a moment, Your Honor. (Pause) Bill, I just want to make sure we've got an an understanding here. Yesterday we introduced a number of exhibits. We had a bunch of exhibits that we stated were produced by Volvo in discovery that looked a lot like this. You remember that?

A Yes, I do, sir.

THE COURT: Which, what exhibit are you now demonstrating on the screen?

MR. BYARS: This is 142, 142.

THE COURT: That was introduced yesterday?

MR. BYARS: I believe so, Your Honor.

Q. This New Retail Order Detail, is that something that's issued to the dealers?

A No, sir.

Q That type of information is sold by Volvo.

MS. PORTER: Don't have that one yet.

THE COURT: We don't have 142. You want to take it off [334] the screen? I don't think 142 was introduced, was it?

MS. PORTER: No.

THE COURT: So if you want to use an example, you may use one that was introduced.

MR. BYARS: All right.

Q Well, if you remember the documents which looked like that, I just want to make it clear that you didn't get access to that as a dealer, did you?

A That's correct. A dealer would not normally have access. I have access as a Plaintiff in this lawsuit.

Q All right. And yesterday we also talked about the matrix documents. Was Reeder-Simco ever made aware of what the matrix was?

A Again, other than this lawsuit, never.

MR. BYARS: I'll pass the witness.

THE COURT: Ladies and gentlemen of the jury, it's, I think time to take a lunch break. There's some things we need to discuss with the attorneys and maybe you can be first in line at the lunch place. I think we need to get back – we'll try to start promptly at 1:00 o'clock. We

may not be able to, but we are going to make a good faith effort to start at that point. Remember the prior, continuous, consistent hopefully, admonitions of the Court not to discuss it with anyone nor allow anyone to discuss it with you. Again, if you do go outside the building, be sure and wear your juror button, and that's not to have you

* * *

[453] A Right.

Q But the minimum 97 parts objective was $625,000 plus a little bit over that, correct? You see that?

A The minimum parts purchase objective.

Q Yes.

A Was 625,765.

Q Right.

A When this process was started one time before.

Q And they lowered that to $395,143.

A They did in fact.

Q Thank you.

A Yes.

Q Mr. Heck, you would agree with me, would you not, that when the majority of the time when you're competing for business on a Volvo transaction, that your competition is from other brands of trucks?

A That are – yes, that are quoting the deal at the same time I am.

Q Freightliner?

A The majority would be described that way.

Q Yes. Thank you. How many times have you actually competed with another Volvo dealer in the last five years on a concession quote?

A At the same time where I –

Q Yes.

[454] A – where I knew –

Q Yes.

A I would say it was several, you know, several.

Q Several?

A Yeah.

Q I mean –

A Two, three.

Q Two or three? Okay.

A That's right, at the same exact time.

Q Of the – all of the quotes that you have actually worked on that you've already testified about?

A That's my belief and answer; yes, sir.

Q Two or three. Okay. And you view a favored dealer when you are doing the comparisons as one who receives a higher concession than you did and you've testified to that, correct?

A That is, that is part of the definition. That's a big part. Yes.

Q Would you look at Defendant's, excuse me, let me get it for you. You don't have it in front of you I don't believe. I want you to look at Defendant's Exhibit 18.

A I do have one of your books up here.

Q Okay. If you do have No. 18, if you could look at that please.

A It's not inclusive of 18.

Q Okay. We'll give that to you in just one moment. While

* * *

[489] returns and the actual earnings as reflected on your year end operating reports?

A The ordinary income number off of that tax return is after our accountant has taken the proper depreciation and the LIFO inventory adjustments and the various other things, and I'm not able to list every one of them, but that's what he does. He does what is supposed to be done to create ordinary income.

Q When you utilize the earnings model which was presented in court, which of those is utilized?

A You use earnings. We didn't talk about using ordinary income. We use earnings. That is what is commonly used for that multiplier process.

Q All right. A moment ago Mr. Williams was asking you about the Hiland Dairy quote. Let me show you and I think he asked you whether you knew what the actual initial quote was that was given to the other Volvo dealer.

A Yes, he asked me that.

MR. BYARS: Your Honor, I believe the Plaintiff's exhibit 155-A has been admitted.

THE COURT: Miss Porter?

A Should I look at that, Joe?

MS. PORTER: Yes, it has.

THE COURT: It's been admitted.

Q I'm sorry. I need to refer to 198-A. Has that been admitted?

[490] MS. PORTER: No, 198 and 198-B has, but not A.

Q Let me show you what's been marked as Plaintiff's Exhibit 198-A. Can you identify that, please?

A Yes. This is a Volvo confidential chart new retail order detail as of 10/14/99.

Q All right. And it has other pages also attached to that Exhibit, doesn't it?

A Yes, sir, several pages.

Q They have different headings?

A Yes, they do.

Q Those were all produced by Volvo –

A Yes.

Q – in the discovery portion of this case, is that right?

A Yes. And they do – some of them are quotes as opposed to order detail.

MR. BYARS: All right. Your Honor, we move for the admission of Plaintiff's Exhibit 198-A?

THE COURT: Any objection?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted.

MR. BYARS: I'm going to refer you to what's listed here at the bottom as VTNA 8485, second page of Exhibit 198, and up here at the top, the name of this document is new retail quotes as of August 26th, 99. Do you see that?

A Yes.

[491] Q And based on the information we've obtained through discovery, do you have an understanding that these reports like this are generated weekly?

A Yes. As of 8/26, and then there would be one as of 8/19.

Q Okay. Now, on a Hiland Dairy quotation, where you sent in your RSA request, the concession amount you received was 7.5 percent, is that right?

A That's right.

Q Now, this other Volvo dealer, on the new retail quotes form it shows that the other Volvo dealer got 8.4 percent. Can you read that, is that correct?

A Yes. This shows 8.4.

Q All right. Now, on this other quote listing here, now your bid was for 12 vehicles, wasn't it, or your request for concession was 12 vehicles?

A Yes.

Q Now, there's another one here requesting 12 vehicles of the same type and another dealer got 8 percent, is that right?

A Yes.

Q And another one at 12, 12 vehicles, same vehicle at 8.7 percent, is that right?

A Yes. And that's within our region.

Q Okay. The next page VTNA, the next page of that Exhibit is VTNA 8464?

A That's right.

[492] Q Reflecting also bids or concession and approvals for Vulcan Chemical of ten trucks, same type, at 9.2 percent, correct?

A That's right. Ten for 9.2 percent.

Q And also another Volvo dealer got an approval for this customer, ten trucks at 10 percent.

A Yes. These are quotes.

Q All right. Another quote which was apparently of Won Trucks at 11.4 percent, correct?

A Sure.

Q Now, on your quote to Hiland Dairy, when you are designating the brand of – or outlining what the components will be on the truck, it says that just the transmission manufacturer, is that right?

A That's correct. Model number, manufacturer.

Q The brand for the rear axle is Meritor?

A That's right, sir.

Q And that's the information on which Volvo uses to make its concession approvals, this information here. Is that your understanding?

A That's what they say, but see, see so many that have that information at all and they still got an allowance bigger than mine.

Q Now, in regard to these, it doesn't provide any further breakdown as far as the capacities of the rear axle or anything further than just the manufacturer brand?

[493] A That's right.

Q And now you do on the engine have a horsepower, but would there be various models of Cummins that might have the same horsepower?

A Yes.

Q And that's not something that's taken into consideration, is it, by Volvo?

A I don't see how it could be. We don't tell them.

Q All right. Defendant's No. 296, do you have that handy?

A Defendant –

Q Okay.

A I think I do. I have it.

Q All right. Defendant's 296 was the letter you received in March of 2001 offering a new dealer agreement, is that right?

A Yes. This was a cover letter.

Q When did your dealer agreement expire?

A March 31st, 2000.

Q So this is a year later you're being offered another one?

A Right.

Q And do you have knowledge that other Volvo dealers were offered a different or newer agreement prior to the time you were?

A Yes.

Q All right. And about when was that?

A I believe it was in the summer, like maybe May or June as [494] Volvo has stated the mandatory binding arbitration clause had to be removed and some statements require a period of review before you can execute that agreement, so that created a delay of several months.

Q So you're talking about the Summer of 2000?

A I mean it's several, some months, several months, not a year.

Q Okay. Now, when you received – this letter here says that it congratulates you on the recent order by ABF and they set your 2001 new truck sales objective for 523 units?

A Yeah.

Q Now, in all of these prior years had you ever received a sales objective near that?

A You don't have – I never have. Joe, you don't have to look.

Q Okay. 523. Under this new agreement that was presented to you, it's Defendant's Exhibit 454. Is one of the differences in this agreement that from the older agreement that it provides for an immediate termination or a termination without being given a cure status for an evergreen contract as in the old if you failed to meet an objective?

A Yes.

MR. WILLIAMS: Object to the form; compound question.

THE COURT: It's overruled. You may answer and I think you did.

[495] A Yes.

Q Does the new proposed agreement have provisions in there restricting your ability to bring an action in court against Volvo?

A Yes.

Q Does it contain provisions in there restricting or allowing for the ability of Volvo to sell direct in Arkansas?

A Yes, it does.

Q Did you write back to Mr. Winner with regard to your concerns about the new proposed agreement?

A Yes; Reeder-Simco did.

Q All right. Let me show you what's been marked as Plaintiff's Exhibit No. 332. What is that?

A This is a letter dated April 13th, 2001, signed by David Reeder, William Heck, and Hershel Cole. Those are the owners.

Q All right. And was that a letter compiled in response to Mr. Winner's letter?

A Yes, sir.

Q And was that sent out on or about the date shown on the letter?

A Yes, it was.

MR. BYARS: We move for the admission of Plaintiff's Exhibit 332.

THE COURT: Would you show it to Miss Porter? I need to see it.

[496] MS. PORTER: Okay.

THE COURT: It will be admitted as Plaintiff's Exhibit 332 subject to the prior ruling of the Court or in accordance with the Court's prior ruling.

Q This letter states that in late March we received your letter dated March 16, 2001, offering a new dealer sales and service agreement to commence April 1, 2001. Volvo's offer of a new franchise agreement has required considerable but guarded thought and study by each of the principals at Reeder-Simco in light of the past dealings between us. As you may know, Reeder-Simco received a copy of a letter from Volvo signed by Chris Patterson, dated December 1, 1999, providing final notice that Volvo

would terminate the prior dealer sales and service agreement effective March 31, 2000. The reasons given –

MR. WILLIAMS: Your Honor, may we approach the bench? We need to approach the bench and ask him to remove that Exhibit now.

THE COURT: Let's approach the bench.

(The following proceedings were had within the presence and hearing of the jury:)

MR. WILLIAMS: It refers to the complaint. Make sure that I understand this, Your Honor. I may be wrong. I apologize. I thought I saw a reference in here to the complaint that we had filed, that Volvo – but I apologize if it's not there. I just saw the reference to the action being filed. I [497] wanted to make sure that was not in there. I had not seen this until just today. In looking at it now, I think it's okay. I apologize.

THE COURT: I don't think it is okay. It does say that the U S District Court case – oh, I see.

MR. WILLIAMS: It says the Western District. I saw that. That's what alerted me. Same reaction.

THE COURT: Nothing else has been added to this since had our conference here 30 minutes ago?

MR. BYARS: No.

THE COURT: Fine.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Continue, Mr. Byars.

BY MR. BYARS:

Q The reasons given by Volvo for the termination action included the alleged non-performance with regard to various business plan objectives. In response, Reeder-Simco filed a verified complaint with the Arkansas Motor Vehicle Commission contesting the termination action. We are sure your are also aware of the fact that Reeder-Simco later filed a complaint against Volvo in U.S. District Court for the Western District of Arkansas. These actions reflect the various contentions by Reeder-Simco that Volvo has not in the past dealt with Reeder-Simco in good faith and in a commercially-reasonable [498] manner; and that Volvo has engaged in price discrimination in violation of the Robinson-Patman Act. There are a number of facts and circumstances too numerous and detailed to explain in this letter giving rise to the mentioned lawsuits, but we believe one of the major problems stems from the terms of the prior franchise agreement itself. Upon our review of the new proposed franchise agreement, we see the same types of problems and concerns. Nevertheless, we would be willing to consider the execution of the new proposed franchise agreement, provided we can work through our problems and concerns, which will require certain revisions to the proposed franchise agreement. One of the first items of inquiry pertains to fleet sales. In our history as a heavy truck dealer, we have had some significant success with large fleet transactions, particularly prior to our experience with Volvo. The new proposed franchise agreement appears to significantly impair the prospect or opportunity for fleet sales by virtue of paragraph 3.11 entitled direct sales. Secondly, and related to the issue of fleet sales, we need some assurances that Reeder-Simco will receive the same competitive pricing equalization as

Volvo itself and other dealers are able to enjoy in both direct and dealer sales. Next, there are substantial pitfalls and problems with Volvo setting the Portfolio of Criteria and parts and sales objectives on very vague or non-existent guidelines. To this day, we do not know how Volvo makes the determination on the Portfolio of Criteria [499] and objectives, other than a general notion that it is based in part on truck registration data received from a third party publisher known as Polk, and a loose connection with Reeder-Simco's past performance. We have previously discussed the non-reliability and non-reality of the Polk data and Reeder-Simco's AOR. We would be glad to discuss that issue with you in detail. The lack of consistent, objective standards with respect to setting the purchase objectives are also demonstrated in your cover letter. Your letter states that Reeder-Simco's new truck sales objective for the year 2001 will be 523 units, when last year the new truck sales objective set by Volvo was 60 units. You also noted that Reeder-Simco's actual parts sales in the calendar year of 2000 was $272,624, but it's objective was $466,902. The proposed objective for 2001, however, is $334,859. How were these objectives determined? Because the franchise agreement purports to allow Volvo to terminate the new, proposed five-year term upon the failure of Reeder-Simco to meet objectives set by Volvo, we desire to negotiate in good faith the realistic parameters of the objectives for Reeder-Simco in advance of executing the franchise agreement. We also have a number of specific questions and concerns about the language utilized in specific provisions of the proposed agreement. Before addressing each of these items, however, we would like to know if Volvo would be willing to negotiate in good faith various terms of the proposed franchise agreement. If so,

please advise [500] as to a convenient time and place when we can meet and discuss the proposed franchise agreement. Thank you for your consideration and attention to this matter. Sincerely, Reeder-Simco Truck Center, Inc., David Reeder, William Heck, Hershel Cole. After this letter was submitted, has there been any satisfactory resolution of your concerns concerning this new franchise agreement –

A None.

Q – proposed?

A None.

Q Mr. Williams also asked you about the Land O'Frost transaction. And on that transaction your concession quote that you received authority for or an approval was two percent, is that right?

A Yes.

Q I want to refer you to Plaintiff's Exhibit No. 155-A. I want to make sure 155-A has been admitted.

MS. PORTER: Yes.

THE COURT: It's been admitted.

Q All right. Let me show you or refer to the fourth page, I'm sorry, the fifth page in that it says VTNA 3131. These are a little hard to read. But this reflects that a dealer, and by the way, the Land O'Frost quotation had to do with VNL 64 day cabs, didn't it?

A Land O'Frost.

* * *

[504] [Deposition Testimony of Christopher William Patterson, read into the record on January 17, 2002. Located *infra* at JA 406 through JA 419.]

* * *

[521] [Deposition Testimony of Robert David Wright, read into the record on January 17, 2002. Located *infra* at JA 420 through JA 426.]

* * *

[538] [Deposition Testimony of Suzanne Keith Warren, read into the record on January 18, 2002. Located *infra* at JA 427 through JA 430.]

* * *

(8)

No. 04-905

Supreme Court, U.S.
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In The Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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In the United States District Court
Western District of Arkansas
Fort Smith Division

Docket No. 00-CV-2031 (RTD)

Reeder-Simco GMC, Inc.,

Plaintiff,

v.

Volvo GM Heavy Truck Corp.,
n/k/a Volvo Trucks North America, Inc.,

Defendant.

Transcript of Proceedings

January 14, 2002 through January 24, 2002

[Testimony of Michael P. Truta]

* * *

[561] that correct? Was there a shift made where it went to a regional concept?

A I'm not sure the timeframes coincide with the 95 date, in all honesty.

Q Well, during the timeframe that Volvo was operating under the Operating Company Concept, was the company actively engaged in direct sales?

A I wouldn't call it actively; no, sir.

Q Okay. And during that timeframe there were no direct sales, which actually occurred within your district, were there?

A In my district at the time? No, sir.

Q All right. So that didn't develop until a little later on as far as –

A Well, my district territory changed, quite frankly.

Q All right. During the time frame that we were looking at the Operating Company Concept, what was the methodology of how concession pricing was given to a dealer?

A Typically the dealer would contact me as the District Sales Manager, and mostly, at that time period it was done either by paper as opposed to electronically, a concession request would come in like we've seen up there, and depending upon the particulars of the deal, I would grant them a concession, and if I felt the deal warranted more than I could under my guidelines give, I would then forward it up the management chain.

Q All right. At that time were the only determining factors [562] with respect to your authority in granting the concession request the particular model of the truck, and the number of the trucks in the deal?

A No, sir.

Q All right. Do you remember when I took your deposition in this case?

A Yes, sir. I remember it quite frankly.

Q And let me refer you to page 16 of your deposition.

THE COURT: Does he have a copy of his deposition?

MR. WILLIAMS: It's sitting right there, Mike, underneath the pad there.

Q Do you have that, Mr. Truta?

A Yes, I do.

Q I asked you did you have a certain percentage that you could allow for the dealer or did you have a certain dollar amount – I'm sorry. Let me back up a little bit. From your answer, what I understand is that the dealer would make a request for a particular concession amount on a given deal and you had authority to go up to – how did you determine when your authority would be cut off? Did you have a certain percentage that you would allow for the dealer or did you have a certain dollar amount? How was that determined? Your answer was it was determined by model. I said all right. And the model of trucks, and the number of trucks are the two determining factors. Then I asked you, and those are the only determining factors at that [563] time? Do you mean for like my authorization? I said, yes, sir, and your answer was yes, wasn't it?

A That is correct.

Q Did the process of dealing with the concessions change after there was a change in the operating concept?

A No, sir.

Q Thank you. And, again, in determining the two – you look at the two determining factors in determining the amount of the concession is the volume of the trucks. Those factors are the volume of the trucks and the model of the truck, is that correct?

A Those are some of the factors, yes, sir.

Q Those are the two biggest factors, aren't they?

A Not necessarily. No, sir.

Q Okay.

A What I was referring to there was my guidelines on the matrixes we've seen are based on the number of trucks and the models of trucks. That's what I was referring to in that phrase, sir.

Q Okay. And my question just now was, the two biggest factors are the model, the model and the number or the volume of trucks in a deal?

A Not all the time.

Q You disagree with that?

A Yes, sir, I do.

Q Let me refer you to page 184 and 185 of your deposition. [564] Now, we've heard this before, but I asked you a question. Can you I guess sort of tell me how you weigh those factors? You're talking about these factors.

A Oh, the very bottom of the page?

Q Yes, sir.

A Okay. I'm with you now.

Q And you said it really varies from deal to deal. As I said before, obviously, the size of the – the order is probably the biggest factor. That's what you told me, right?

A Correct, sir.

Q And also the model is a big factor, isn't it?

A Yes, sir.

Q I said it was a big factor then and it's a big factor now, isn't it?

A Yes, sir.

Q That holds true even after you might seek additional authority at Greensboro, is that correct?

A That's one of the factors; yes.

Q Well, the factors, even after you submit this on – two of the big factors are the volume of – the number of trucks in the deal and the model, is that right?

A Those are one of – those are both factors of many, yes, we consider.

Q Okay. Now, during the time that the Volvo organization was set up in terms of regions, explain to me the hierarchy of how

* * *

[568] A Yes, sir.

Q Okay.

A Once again, depending upon the situation, depending if the – in my estimation if it was in my guidelines, that the dealer probably needed more to be competitive.

Q Can you recall any times where you specifically suggested to Reeder-Simco that you could, you could maybe allow for a higher concession than was requested?

A I don't remember a specific time, but that occurrence might have happened.

Q Was Des Fuller – were you involved in setting objectives for Volvo dealers?

A Yes, sir.

Q And was Des Fuller also involved in setting the objectives?

A Yes, sir.

Q Would you agree that the sales objectives which had been set by Volvo were truly a level of truck sales that a dealer should reasonably be to attain?

A Reasonable? Yes, sir.

Q Was there a consequence to not meeting objectives?

A Yes, sir.

Q In the case where you may have a Volvo dealer who might not achieve a full objective but was close, would that dealer necessarily be placed on probation?

A Not necessarily. There's other factors that would put the

* * *

[Testimony of Willard Charles Coffron]

* * *

[727] introduction of Defendant's Exhibit 148.

THE COURT: Any objection?

MR. BYARS: Is that the same as Plaintiff's 69?

MR. WILLIAMS: It may be.

MR. BYARS: Plaintiff's 69 is admitted, isn't it?

THE COURT: Fine. I'll admit this as Defendant's Exhibit 148 then, which is a duplicate of Plaintiff's 69.

Q Okay. Mr. Coffron, this policy says that its purpose is to define clearly how Volvo Trucks North America will operate in the area of requests for retail sales assistance and that's what we sometimes or you sometimes call concessions informally, correct?

A They renamed it; yes.

Q Under the policy itself, make this a little wider, it states VTNA, as a producer and distributor of commercial vehicle trucks, may from time to time provide additional retail sales assistance in addition to the published dealer net and manufacturer's suggested retail pricing. The assistance was formally termed concessions and is now referred to as retail sales assistance or RSA. RSA is provided as required to meet competitive situations. Now, let's just drop – let's stop right there for a moment, and tell me in your experience why is RSA or concessions – are they required to meet competitive situations?

A Because every truck transaction is unique. It's different. It's not a – it's not a car deal. It's a – there's too many variables in the sale to provide a single source discount level.

[728] Q And when we talk about meeting competitive situations, what about the competitive situations from other brands? Is that something – a form of competition Volvo faces?

A Absolutely.

Q As in terms of competition is there competition between Volvo dealers or more between brands of trucks?

A Large majority is between Volvo and other brands of trucks.

Q It states that RSA is – well, let me before I get to that, it says VTNA will provide RSA uniformaly as in the case of a specific customer transaction irrespective of customer domicile and in the same manner to all dealers. You understand what that means, sir? What's that referring to?

A I do.

Q Could you explain that for the members of the jury?

A That statement means that if two dealers in different areas of responsibility are quoting the same customer, they will receive the same exact concession, RSA.

Q Right, and then it says that RSA is granted to dealers with the understanding that the specific competitive situation, customer name, and description, as listed in the dealer written request, is in fact the ultimate end user buyer of the vehicles, and to whom the vehicles will be warranty registered. Why is that important?

A It's to prevent a dealer from calling on a large fleet transaction customer and getting a high RSA level and then [729] retailing the trucks one by one to – in a situation where they wouldn't need that much money to meet competition.

Q Okay. And then in the next paragraph it says dealer leasing companies are an important part of VTNA's overall business objectives, and as such, dealer full service leases are treated as retail transactions. What is a full service lease?

A That's – the ownership of the truck is usually maintained by the leasing company. It's rented on a mileage and monthly charge to the customer.

Q Okay. So does that include normal maintenance so the person who's leasing the truck doesn't have to pay for the normal maintenance?

A It's just a rental factor.

Q Okay. And are those an important source of sales for Volvo?

A They are.

Q On page two of the policy, it sets forth the procedure. And it states all – when – I'm sorry. When requests are made for RSA, it is the responsibility of the requesting dealer to supply all pertinent information, including but not limited to, and then lists several things. I'd like to ask you about some of those. Customer name and location I think are probably fairly obvious. The equipment specifications. Why is that important?

A Because you can vary on the same piece of equipment depending upon the components specified engines, rear axles, transmissions, cab size, by thousands of dollars on the same [730] truck.

Q So if you have the same model truck, depending upon how it's equipped, there can be a variation in the price?

A Absolutely.

Q Have you at my request prepared a sample specification to show the potential price differences in trucks?

A I have.

Q Let me show you what I have marked for identification as Defendant's Exhibit No. 89-A. Can you identify that document, Mr. Coffron?

A I can.

Q What is it?

A This is what I prepared to show the difference in option pricing so that you could select on a truck.

MR. WILLIAMS: Okay. We move for the introduction, Your Honor, of 89-A?

THE COURT Any objection?

MR. BYARS: Let me see it, please.

MR. WILLIAMS: Sure.

THE COURT: Could I see the attorneys at barside here?

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

THE COURT: I don't know how much longer you're going to be, but I don't think we're going to finish

with him by 6:00. We have got some weather reports, apparently the rain has turned

* * *

[732] THE COURT: Let's go ahead and get this out of the way. That won't be any big deal.

MR. WILLIAMS: Sure.

(The following proceedings were had within the presence and hearing of the jury:)

Q Mr. Coffron, can you just explain to me briefly how you went through and prepared this potential price difference for the trucks of the same model?

A Sure. In each one of those categories, and I only picked out the major components in most cases.

Q You need to see it, sir?

A No.

Q Okay. Thank you.

A You can select our standard which is a no charge cost, or you can select an option up to that price level that I gave you, a retail. That wouldn't be the customer's final price. That would be a retail suggested price.

Q These are retail prices only. Okay. With that, Your Honor, I would move for the introduction of Defendant's Exhibit 89-A.

THE COURT: You wish to voir dire, sir, on that Exhibit?

MR. BYARS: No, Your Honor. I'll just reserve cross.

THE COURT: Fine. It will – do you have an objection to the Exhibit then?

MR. BYARS: No. I'll cross examine.

[733] MR. WILLIAMS: Okay.

THE COURT: It will be admitted without objection as 89-A.

Q Okay. This is the document 89-A. I just wanted to briefly run down there, and for the members of the jury, on the left hand, it shows a base chassis for a 2001 VNL64T 660, correct?

A Yes.

Q And it says base chassis $97,014. What is that?

A That's our standard.

Q Okay.

A You would get a truck at that price.

Q Okay. And then there are two columns. One's called low and high, and then it starts with engine, and then it goes down there and the engine, it just has an example. It's a zero up to a high of $10,911. What does that represent, that price, sir?

A The zero is our standard, engine's included. You can option up to an engine that costs 10,900.

Q Okay. And there are other things listed under engine. Are those all engine-related components?

A They are.

Q Okay. And the transmission ranges from 211 to $1,432.

A Right.

Q And, again, there are engine options there, transmission options?

A Transmission options; yes.

[734] Q We can work our way down. There's a rear axle from zero to 3100. A rear suspension can go from zero to 2400. Just going to the bottom line. After you pick all the options from the low to the high, what is the final difference that's between the options noted?

A 44,000.

Q Okay. Well, one's 44,082 and the other is $371, right?

A Right, $43,000 difference.

Q All right. That's the same model, correct?

A It is.

Q And if you were going to see it going down the highway, maybe you could tell, but would most of us be able to tell the difference in that model?

A No. Most of you wouldn't be able to tell the difference.

Q Okay. Back to Plaintiff's, excuse me, Defendant's Exhibit 148, your own equipment specifications, it says timing of purchase. Why is that important?

A The timing of the purchase can be important for a couple of reasons. One, if we need orders at that particular

time, if we have holes in our order board that we need to fill, it can, it can affect the finance rates. It can affect the lease rates if they are involved.

Q And then it says complete details of the transaction and lists several items with arrows out there. Are those factors which are considered, each of them?

[735] A Right.

Q Trade information. Why are trades important?

A Because we are probably going to have to either purchase the customer's current fleet or find a buyer for that fleet.

Q We already talked about financing. Over allowance?

A Over allowance is if his current fleet is on his books for too much money, we may have to throw or put money against those trades just to get them off of his books.

Q What does pricing strategy refer to?

A I don't know what it means in that context. I didn't –

Q Okay. All right. That's fine. Price levels, what does that refer to?

A Price levels. We, we – you have to have – we have about three or four price increases during the year. You have model year change, which creates different pricing, so you have to make sure that when the deal goes in it's at the current price level in the data book that you're using to specify.

Q Delivery requirements?

A Delivery requirements. If it's as soon as possible built, if it's as quick as we can build them and deliver them, that's the cheapest transaction to handle. If he has spread delivery, he can spread delivery on a large fleet over a year which creates higher costs.

Q Last purchase information?

A Last purchase information is usually to find out about [736] competition components used in his truck.

Q Extended warranties?

A Those are – we have to charge for extended warranties or get them issued by the component suppliers.

Q Local vendor contributions, what's that?

A The major suppliers usually have area distributors. The engine manufacturers all have distributors that they use for their products and sometimes those distributors are interested in getting their products into that fleet, too, and will offer monetary assistance.

Q How does that affect the concession rate?

A It can lower the concession rate.

Q Local installations?

A A customer may require something on his product that we don't offer at the plant. The dealers will arrange to have that installed on the tractor and then pass it along.

Q And it's not listed on here, but are you familiar with the term Conquest account?

A I am.

Q What is a Conquest account?

A Again, it's like a target account. It's someone that we have decided we want to do business with.

Q Okay. So how does a Conquest account affect pricing or can it affect pricing?

A We can make a very attractive pricing for a Conquest [737] account.

Q I'm not sure conquer is the right word. If you conquer a customer and you sell to them, at that point, and they become a long-standing customer, then how does that affect your pricing?

A Well, it kind of sets the bar that we have to work off of from year to year.

Q What about other competitors? Are there other competitors out there as well?

A Same thing, they do the same thing to us. If we have a long-standing relationship with a customer, we know that our competition is going to go to high concession levels to get that customer away from us.

Q Okay. What about the season of the year? Is that ever a factor in concessions?

A It is for most manufacturers. They have high production activity during different seasons of the year. Vocational markets, being dump trucks and construction trucks, are always strong in the spring. They may lower concessions. People that are strong in that business might lower their concessions during that time because their plants are full.

Q In terms of the equipment and engines particularly, if you can sell a Volvo engine with a Volvo truck, does that have any effect on the pricing?

A It does.

Q How is it affected?

[738] A We can, we can make that a more attractive deal only because we're supporting the trucks with parts and service, which we want.

Q I'm going to show you what I've marked, excuse me. I think it's already in evidence as Plaintiff's Exhibit 94.

THE COURT: Holly, it's getting hot in here again.

MS. PORTER: It is?

Q You didn't identify Plaintiff's Exhibit 94, Mr. Coffron. Are you familiar with this document?

A I'm familiar with this type of document.

Q Okay.

A It's a Field Sales Force Retail RSA Assistance Guideline.

Q And have there been similar Guidelines in effect for a number of years?

A Yes.

Q It's shown at the top the various models and it shows retail sales allowance by authority level, one to two, three to nine, 10 to 25, greater than 25 to 49 and over 50, correct?

A Right.

Q This is what's referred to as a matrix?

A It is.

Q It says, and let me enlarge it so we can all see it from this copy. It says these levels indicate the maximum authority for the indicated model and volume. Accordingly, deals quoted by regions should not all receive maximum RSA?

[739] A Right.

Q Can you explain that?

A The guideline is established based on the production costs, on average production costs for your product line, so its a big pool and we decide how much it costs to build those trucks by model and by Volvo's targeted profit level they want to reach on each truck, so the averages are then issued to the field for competition. We would like the district managers and the field sales people to sell under those guidelines. We encourage it.

Q How does the matrix work in general terms?

A Field sales managers have the authority to grant those concessions or those RSA's to meet a competitive situation and take the deal down.

Q And we talk about field personnel. Who would that be?

A District sales managers.

Q Okay. And what about the Regional Vice Presidents, do they have authority?

A They do.

Q What authority do the Regional Vice Presidents such as yourself have?

A It varies. This one's printed so that I can use that whole matrix in one deal to, to complete a deal. I don't have to stay within any one of those columns.

Q Okay. It says down at the bottom guidelines for additional considerations, types of transaction. It says retail sales [740] allowance up to published guidelines, specific authority, Regional VP, correct?

A Correct.

Q And that's what you're referring to?

A Yes.

Q And this is the same type of document you said that Freightliner and Sterling have?

A Yes.

Q And the numbers wouldn't be the same?

A No.

Q But the concept would be the same?

A Right.

Q And would theirs also be used by the people in the field?

A Yes.

Q Would it be a reasonable thing, a reasonable business judgment on the part of Volvo to disclose the matrix to all dealers in your opinion?

A No.

Q Why not?

A First of all, we could never come up with a single discount level that would meet all the competitive situations that are in the field. Secondly, as soon as we distributed this form to our dealers, it would be in our competition's hands. Volvo would never get another deal. We would lose business.

Q Why would it get to or how do you think it would get to your [741] competition?

A We have a lot of dealers that have dual franchises.

Q What do you mean dual franchise?

A They will franchise with another OEM, with another, with Mack, with Navistar, with Freightliner.

Q Okay. And if that dealer got it, how could he use it if he so chooses?

A He could just call in – he could make an appeal off of his concession sheet and say this is where Volvo is on this deal. I need $25 more.

Q And you said we would never get another deal. Could you elaborate a little bit?

A Our numbers would be out in the field. We wouldn't be competitive anymore.

Q Okay. Why is that important for Volvo to not have your numbers out in the field where everybody knows them?

A Because we're not, we're not using the same numbers on every deal. Everyone is unique and we've got customers we don't have to go as deeply to maintain.

Q Is it – would it be a reasonable thing to give the maximum concession on all deals as a business proposition for Volvo?

A No.

Q Why not?

A We need to – we would need an average of concessions out in the field to maintain profit, large overheads to cover.

[742] Q In order to achieve the financial goals and projections of Volvo, do you have to have some deals that come in under these maximums?

A We should have; yes.

Q What percentage of transactions or proposed transactions do you need that are off the matrix in terms of either the size of the deal or the percentages that are being requested to meet a competitive situation?

A That matrix in today's market at about ten trucks, you can't use that matrix.

Q Why not?

A Competitive situation. It's deeper than that.

Q And why is that today?

A Over capacity.

Q Okay. The market is down and –

A It is.

Q My question was, to follow up then, do you have a feel for what percentage of deals you see that are off the matrix?

A Probably 60 to 70 percent are off the matrix.

Q Okay. And when we say it's off the matrix, what does that mean as a practical matter? What happens in consideration of that deal?

A If it's found to be non-competitive under the guidelines that we've issued, there's an appeal process. The dealer can request – the dealer or the field district manager can request a

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[761] Q Last Friday we had some discussion I believe it was of Defendant's Exhibit No. 148, which I believe is the same as Plaintiff's 69. Do you recall looking at this last Friday?

A I do.

Q I'd like to first of all direct your attention to the second to the last paragraph here dealing with dealer leasing companies. It says dealer leasing companies are an important part of VTNA's overall business objectives and as such, dealer full service leases are treated as retail transactions. These transactions must be full service leases. Any instance where a dealer represents an RSA – we need to get these acronyms straight. What that means is any instance where a dealer represents a discount or concession, is that correct –

A Right.

Q – as a dealer full service lease, is that correct?

A Yes.

Q And, in fact, uses it to obtain additional concession or RSA for a retail sale, versus a full service lease, is considered a misrepresentation of the transaction. The ultimate end user must be included on the RSA or discount request at the time of submission, and the units must be warranty registered in the leasing company name, is that correct?

A Right.

Q It states that any change in the status of the ultimate purchaser including misrepresentation of the full service lease [762] customer of a specific vehicle as listed in the RSA or discount request gives cause for VTNA to adjust, modify or otherwise deny payment and/or charge back to dealer a portion all of the amount granted, is that correct?

A Right.

Q So if we have a dealer leasing company, first of all, tell me what that is? What is a dealer leasing company?

A We were encouraging dealers to start a leasing, internal leasing company to compete with the major leasing companies. A large portion of the class eight market is under a full service lease contract. We wanted them in that business.

Q So if a dealer has its own leasing company, that's what this policy refers to, or speaks to, is that correct?

A Yes.

Q And so in those cases where there is a dealer-owned leasing company, does this policy mean that the concession request or the concession request amount is treated the same as if it is a – the same as a retail sale to the identified underlying end user?

A Not generally.

Q And explain then how this works.

A The leasing companies, we actually separated leasing companies from the retail concession in the amount or in the theory that we would get a certain amount of business through that leasing company on an annual basis. We looked at that nationwide and set concession levels or RSA levels based on how [763] many trucks we expected to get. They were standardized usually across the country.

Q Does this not allow for some type of a charge back if the dealer leasing company misidentifies the end user?

A If the end user is misidentified, it – we had the ability or the authorization to charge back concession, yeah.

Q Okay. Well, the policy says that's what will happen. Right?

A Yes. The only case I can think of that not happening is if the leasing company or the ultimate customer cancelled the unit. There was no fault of the dealer.

Q So that you're carving out as some exception to this policy?

A Yes.

Q Okay. The policy doesn't say that, does it?

A No.

Q In your testimony I believe – did you make a statement that the RSA or the concession methodology used at Volvo actually allows Volvo to sell at a higher profit to someone who will pay more?

A Yes.

Q So depending upon the circumstances, if you might have some customer who is willing to pay more, there might be a difference in the concession level that you grant to a dealer?

A Each deal is an individual specific transaction. It's, the concession level granted was usually based on the competition [764] that we had to meet. We have competition on virtually every deal we quote.

Q Is it a true statement that at Volvo the district sales managers are compensated in terms of salary and bonus?

A They are.

Q And as part of the bonus compensation to a district sales manager, do they receive a bonus based upon the volume of trucks they sell?

A Volume and gross profit.

Q Volume and gross profit.

A And Volvo engines.

Q All right. At the same time Volvo encourages the district sales managers to try to sell these these trucks at

a level which is below their concession authority on the matrix, correct?

A We encourage them to stay below the matrix level, yes.

Q All right. Such that it's foreseeable, isn't it, that a district sales manager may desire to obtain volume with respect to one of his dealers and try to obtain profit margin to another with respect to another dealer?

A No, because that would be – that would have to assume that we didn't want larger deals at every dealer and we did.

Q All right. Now, the district sales manager, what portion of his bonus is based upon the volume of trucks?

A It fluctuates year to year, depending upon the corporate objectives, but it's usually set up 40/40/20 percentagewise.

* * *

[768] the same customer, no matter how many dealers were involved, we would equalize the RSA to all the dealers quoted.

Q In other words, that's an obligation of Volvo is to equalize the concession amounts. Would you agree to that?

A I would for the same customer.

Q Just for the same customer?

A If it's identified as the same customer.

Q Does Volvo make any effort to try to equalize the concession amounts when you're not dealing with just the same end user?

A No.

Q Thank you. You stated, I believe, that as a Regional Vice President working for Volvo, that you had the authority, unlike a District Sales Manager, to in looking at a transaction that might fall under the matrix, as a Regional Vice President, you had the ability to bump the RSA without regard to the volume of trucks stated on the matrix, is that correct?

A Yes.

Q Mr. Coffron, did you view the sales objectives set by Volvo to be reasonably attributable or reasonably attainable targets for the dealers?

A Yes.

Q After the sales objectives were determined and provided to the dealers, were the sales objectives ever adjusted downwards?

A Yes. I'm sorry. Could you repeat that?

Q Yeah. After the sales objectives were determined and

* * *

[771] amounts?

A They are a captive finance company. They may run specials during the year to assist us in sales which would lower interest rates.

Q So are you saying that when a dealer requests a certain level of concession on a particular deal, that the decision makers might grant the dealer a higher concession because they use Volvo Truck finance?

A No. I wouldn't say that.

Q All right. Does it affect concession at all?

A Using Volvo finance?

Q Yes, sir.

A It could affect concessions only in that we could have them finance trades, make the deal easier to put together.

Q All right. So if a dealer has other financing arrangements, doesn't that take the financing factor out of the equation with respect to Volvo?

A Yes.

Q Has the competition in the area of heavy truck sales been at a high level since 1996?

A Yes.

Q And have the profit margins in the heavy truck business been relatively low since 1996?

A They have.

Q Would you agree that a new sales objective for a Volvo

* * *

[Testimony of Michael P. Truta (resumes)]

* * *

[786] A We equalize the concession. In other words, we give them both the same percentage.

Q Now, do you attempt to determine whether there are other dealers bidding on the deal, specifically, if you see a bid that comes in from outside your AOR?

A Yes, sir. We typically – we ask for the home of where the customer is, where they are domiciled, and then we will run a name search to see if there's another dealer on that same deal, and the reason we do that is to protect both dealers so we don't inadvertently give one guy more or one guy less than the other dealer.

Q Explain to us what an AOR is.

A An AOR stands for area of responsibility, and that is a geographic area, typically made up by counties that have been assigned to a particular dealer as their sales area.

Q I believe you also heard Mr. Heck testify I think on cross examination that he remembers maybe two or three occasions where he placed a competing bid against another Volvo dealer. Did you hear that testimony?

A Right.

Q Does that surprise you at all?

A No.

Q Where do you see any competition for Reeder-Simco, however it may be, with other Volvo dealers?

A Typically they would compete with the dealer in Springdale, [787] Arkansas, and there was one occasion where they competed with the dealer in Springfield, Missouri. Besides that, not too much.

Q Did it happen very much even with Springdale and Springfield?

A No, sir.

Q Earlier you were talking about the different items that you evaluate for the deal. In your opinion, what would happen if Volvo could not adjust its prices to meet competition or based on these other factors?

A We get very, very few deals.

Q And why is that?

A You couldn't be competitive. It's a fluid situation. It's not black and white. Depending upon what happens with the customer, the situation will change. Sometimes the customers will change their mind on how many trucks they want to order. When you're already into the process, they will add or delete. Sometimes they want to change the number of trucks they want to trade or not. That's just one example. They may change time of delivery. They want it now. Maybe they don't want them for a year from now. And that makes a difference in what we can do as far as pricing. It varies a lot, and not having the ability to adjust to that, I just don't foresee us getting very many deals.

Q Would it be reasonable to put one price for one model of truck based solely on the quantity of the truck?

A No, sir.

[788] Q And why not?

A Once again, we wouldn't get any deals. It's not, it's not black-and-white-type of situation.

Q As far as pricing is concerned or the level of concession that tiy may be able to give, can the matter of a month change that situation?

A Absolutely.

Q And can you tell me about that?

A Well, a month's difference could make a difference depending on model year, 2002 versus 2003. It could make a difference in where the factory is in building trucks as far as our order board. Do we have a leaner order board or do we have a bigger order board?

Q Let me ask you this: What if – assume that Volvo's order board was fairly low, how would that affect?

A Well, we would probably be more aggressive in our pricing or concession level because if it was a difference between either sending people home and keeping them working, obviously we want to keep them working.

Q And when you say sending them home or keeping them working, who are you talking about?

A I'm talking about the workers on the lines, the factory workers themselves.

Q That build the trucks?

A Absolutely.

[789] Q Can the level on the order board change fairly quickly?

A Yes, sir.

Q Let's shift gears a little bit and talk about your dealings with Reeder-Simco. In your experience with Reeder-Simco how would you describe them as a Volvo dealer?

A For the most part I would say that they were not overly aggressive. They tend to do like fleet deals more than the smaller onesy-twosy type of deals. They were a General Motors light/medium duty dealer and that seemed to be their main thrust and their main focus, and Volvo seemed to be a secondary product with them.

Q I want to put up on the overhead what has been admitted as Defendant's Exhibit 127, and can you identify that document for the jury?

A Yes, sir. It looks like a contact report that I made after my – I believe is that May of 97 up there? Yes. That was probably my – yeah, it was my initial call, my first call on them as a DSM to visit the customer, visit Reeder-Simco.

Q Let me direct you to – on the second page of paragraph seven. I'm sure I can put that where we all can see it. Can you read paragraph seven for us, please?

A They have a big enough medium duty base in Ft. Smith that they could survive without us, Bill said. That wasn't said as a threat, but more a statement, Bill said that they want class eight and are a lot more profitable because of class eight.

* * *

[801] I'm doing it now. I'm going to admit these Exhibits over your objection, 268, 269, and 270. I will permit you to

cross examine, if he's aware that you requested all of these before and that they weren't made available to you. You can ask that question.

MR. BYARS: Okay.

(The following proceedings were had within the presence and hearing of the jury:)

MR. SHANNON: Your Honor, just for the record, I – 268 and 270 have been admitted?

THE COURT: Yes. I've admitted all of those. I think there were three of them, I believe.

MR. SHANNON: One of those three had previously been agreed to.

THE COURT: Fine. Those are admitted subject to the Court's prior ruling.

Q Mr. Truta, you were in the Court when there was a discussion about Hiland Dairy –

A Yes, sir.

Q – and some allegations that Volvo had treated the Springfield, Missouri, dealer differently than it treated Reeder-Simco for the Hiland Dairy transaction, is that correct?

A Yes, sir.

Q Let me put on the overhead what is marked as Defendant's 268, and has been admitted, and can you tell us what that is?

[802] A That's a concession request from Springfield, Missouri, for 16 VNL 64 T day cabs from January of 99, concession was 7.5 percent.

Q Okay. Now, I notice you said January of 99.

A And the reason I did that, that's a misprint. That was in 99. That deal happened in 99. I think – what I think happened, quite frankly, is when the dealer down there wrote it, it was right after the turn of the year and he was still writing in 98, but the deal occurred, this concession did come in 99.

Q What year model were these trucks?

A 2000's.

Q Would they have been bidding 2000 trucks in January of 98?

A No.

Q Okay. What level of concession was granted to the dealer in Southwest Missouri?

A At the time we gave a 7.5 percent.

Q I'll put what's been marked as Defendant's Exhibit 269 and can you identify this document?

A Yes, sir. That's a request from Reeder-Simco for Hiland Dairy out of Springfield, Missouri, for 12 VNL 64 T day cabs in July, you know, five, six months later. Basically – it was the same deal, and we gave – I equalized the concession at the time, 7.5, which is the same amount I gave the dealer in Springfield.

Q Now, can you tell me what Defendant's Exhibit 270 is?

A That is a concession request dated 8/19/99, approximately a [803] month after on – for Hiland Dairy for 12 VNL 64 T's where I raised the concession an additional $870 or eight-point – it was 18.5 percent to get the – get the order.

Q Can you explain the circumstances of this 8.5 percent increase for the Springfield deal?

A What had happened was this customer, Hiland Dairy, who had previously bought all of their trucks and continued to buy their trucks through Springfield, came to the dealer in Springfield and says, we're now ready to buy, and we want the same price you quoted us back in January of the year. The dealer contacted me, in essence we had a price increase. I ate part of the price increase, and the dealer in Springfield ordered the trucks. It was a kind of a bang-bang-type of deal, and that's why they got the additional dollars.

Q Would the dealer – would the customer have ordered the trucks from Springfield before or after this, this document here of 8/19/99?

A Probably right about the same time.

Q Did you contact Ft. Smith or Reeder-Simco or Mr. Heck about the bump for the price protection?

A No, sir, I did not, and to answer your question, the reason I didn't is because the order had already come in. It was a done deal.

Q A done deal for whom?

A For Southwest Missouri Truck Center, the Springfield dealer.

[804] Q Mr. Truta, did you treat Reeder-Simco any differently than you treated the Springfield, Missouri, dealer on this Hiland Dairy transaction?

A No, sir, I don't think so.

Q There's also some discussion about a deal to Tommy Davidson, and let me put up what has previously been admitted as Plaintiff's Exhibit 135, and can you identify that document?

A That's a concession request from Reeder-Simco for five VNL 64 T 610's.

Q And can you just explain to us the circumstances surrounding these concession requests regarding Tommy Davidson?

A Sure. I think initially they – we gave them 7 percent and you'll see a – it's going to be 17 percent. I'm sorry. And then we bumped it to 8.1 percent, and this says to equalize concession. What happened was I had two dealers on the deal, Springdale, Arkansas, and Ft. Smith. I had two dealers, two sales people working the deal. The salesperson in Springdale called me and basically said, I need some more money on the deal for competitive reasons, so at the time, if my memory serves, Freightliner was our competition, and competitive situation. He felt he needed some more money than what we had initially given them, and I gave it to them, and at the same time I equalized it and I gave Ft. Smith the same amount.

Q Let me put up what was marked as and admitted as Plaintiff's 136, and can you explain to us what this document is?

* * *

[831] concession to be – to make – to obtain sales of trucks, despite their efforts in making bids to customers?

A I have no way of knowing.

Q There were quite a number of bids to customers that Reeder-Simco actually made, which were not brought up by Mr. Shannon which did not result in sales, aren't there?

A There were more? Yes, sir.

Q And you went through and Mr. Shannon went through a number of these concession requests whereby you actually granted the amount of the concession requested, is that right?

A That is true.

Q And with respect to G. Ray Baker when Reeder-Simco requested 10 percent and actually got the 10 percent, they made the sale, didn't they?

A With my help; yes, sir.

Q And I believe in earlier testimony you had indicated that in on some occasions that in granting concession requests, that you would advise dealers sometimes that you could go higher than the amount that they requested, is that true?

A In some cases, depending upon the situation, and once again, every deal stands on its own. If I felt that a dealer was not asking enough depending upon the situation, and because I travel a fairly large geographical area, I have a better feel for what's going on in the marketplace and what the competition is doing, and if I felt the salesman, for whatever reason, maybe he didn't [832] do his

homework or didn't know enough about the account, we would talk and decide maybe, yes, I could go a little bit deeper on a concession, but it would vary on, you know, from deal to deal.

Q With these examples that were brought up by Mr. Shannon, did you recognize anywhere you granted a higher concession than that requested?

A I don't think so.

Q Okay. I believe that you've had some discussion with regard to Defendant's Exhibit 128 which was admitted, and that pertains to the comment here about Reeder-Simco not being able to keep exclusive class eight salesmen. Do you see that?

A Yes, sir.

Q And this was a memo to who?

A Contact report, looks like I sent to David Winner.

Q David Winner. Who's Mr. Winner?

A He's in our dealer operations group.

Q And wasn't Mr. Winner the guy with Volvo who was sort of in charge of this responsibility of determining which dealers were going to be terminated or cancelled?

A You'd have to ask him.

Q Well, what was your purpose in sending this memo to Mr. Winner?

A If memory serves, this was – I was asked to, once again, once the lawsuit came in, asked to keep our dealer

operations people apprised of any contacts I made with the dealer.

* * *

[835] (Off the record at this time.)

Q Did you earlier make some kind of comment concerning Reeder-Simco, Reeder-Simco's representation of the VNL 770's?

A I'm sorry. I'm not sure I'm understanding your question.

Q Did you in your direct testimony by Mr. Shannon talk about VNL's commitment to the 770?

A I talked about Volvo's commitment to the VNL product which would include the 700, the 660, the 610, the 420, if that's what you mean.

Q All right. And was there any comment or criticism by you with regard to Reeder-Simco's efforts on selling the 770's?

A I don't remember any particularly.

Q Do you recall Reeder-Simco having the first largest orders for the VNL series to Hiway Express, about 80 trucks?

A That order came in – yes, I do remember it; yes, sir.

Q This memo says just a short note regarding subject dealer. In my visit there –

THE COURT: Why don't you make it a little larger and that way maybe we can read along with you.

Q Just a short note regarding subject dealer and my visit there on 3/25/99. Dealer currently has about 11 units including eight or nine 770's in stock and about ten more on order. Trucks are well displayed at the heavy duty annex, which would not be a bad-looking dealer location if they had an active parts department, a mechanical shop, as you know the shop there now is [836] strictly a body shop. The dealership currently employs two fulltime medium-duty salesmen in addition to Bill Heck who handles key fleet accounts. As you know, the purpose of our visit was to call on USA Trucking. This account was a Volvo account at one time, and five years ago or so went to Freightliner. Is that what FRT, you think that's what that would mean?

A Freightliner, yeah.

Q Due largely to the company's shortcomings in product, financing and dealer support away from the Ft. Smith area. We have the opportunity to quote 563 units for delivery next calendar year. At this point this is a dealer transaction and we do not foresee changing it to an MSA or national account deal. The dealer has a good relationship with key players and knows the operation well. In an effort to improve customer support, the dealer has agreed to extend its service hours should we be successful in placing some, would that be units?

A Yes, sir, probably units.

Q Dealer support is a key issue with the customer, not only in the home market, but in terminal locations in Shreveport, Dayton, Ohio, West Memphis, Arkansas. I don't know the situation in Dayton, but we have a potential problem in Shreveport and should make a deal with USA. We might need to go to the Rush Group to set them

up as a parts and service dealer. No need to do that unless and until . . . then Mr. Fuller says while I am in [837] concurrence that as currently structured Reeder-Simco is not a long-term dealer, we do need a dealer in this market, and given the options, they appear to be to the only game in town for exclusive representation. Do you see that?

A Yes, sir.

Q Why would there be discussion between Mr. Fuller with a copy to you about Reeder-Simco not being a long-term dealer?

A I really don't know, sir.

Q Who was Barbara Rossetti?

A Barbara Rossetti was a person in our Dealer Operations Department who had responsibility for several regions including the Southwest Region at the time.

Q Okay. And Barbara Rossetti was one of the persons responsible for sending out these deficiency cure status and notifying the dealer that they're not meeting their objectives and that type of thing, is that right?

A I believe that was one of her responsibilities.

Q In this memo where Mr. Fuller says that he concurs that Reeder-Simco is not a long-term dealer. That was in March of 1999, is that right?

A Yes.

Q Does that indicate to you that some kind of a decision was made as to Reeder-Simco prior to December of 1999?

A I can't say what that really means. You'd have to ask Dez Fuller what he meant by that. (Pause)

[838] Q With regard, again, to USA, I'm going to refer you to Plaintiff's Exhibit 336, which I believe has been admitted.

MS. PORTER: I thought the Defendant had an objection. Is it admitted or –

Q This is a memo. It says reason for contact, Dez Fuller, Mike Truta, Bill Heck and writer met with Robert Powell, Mike Davis to deliver a sales presentation on VNL fleet, had run some WIA product, but has been all – what is FLD?

A Freightliner.

Q For several years. Mr. Powell stopped the presentation once he saw pricing. He did state that we were competitive versus Century Class, but much higher than Freightliner pricing.

A Actually that FLD, it was a model of Freightliner.

Q All right. Overall Heck seems to have a good personal relationship. Follow-up activity planned from Chris Patterson, is that right?

A Yes, sir.

Q Who is Chris Patterson?

A Chris Patterson at the time was the senior VP of Sales and Marketing, I believe was his title.

Q And is it true that Mr. Powell stated that one of the main objections they have on Volvo is the pricing?

A In that particular case it was.

THE COURT: What was that Exhibit, No. 336?

MR. BYARS: 336, Your Honor.

[839] If I can refer you to Defendant's Exhibit No. 196, there was on – this was Reeder-Simco's concession request on Danmar Transit, is that right?

A Yes, sir.

Q Did you have knowledge that Reeder-Simco was making efforts to sell Danmar Transit prior to this concession request?

A Yes, sir. I remember going and visiting with one of the salesmen from the dealership.

Q So you had a visit with Reeder-Simco's salesman. You actually met Mr. Bearden?

A I can't remember the gentleman's name, but I remember that he was introduced to me as the decision maker.

Q All right. And in this particular instance, Reeder-Simco requested 7.84 percent concession?

A Yes, sir.

Q Most of the time do you receive a concession with that specificity?

A Typically, no.

Q Okay. Does that indicate to you that Reeder-Simco knew right where they needed to be in order to win that business?

A Not necessarily.

Q Are you aware of other Volvo dealers in the same timeframe receiving a higher concession with respect to around the same timeframe, same model, same quantity of higher than 7.84 percent?

A That's possible, depending upon the situation.

[840] Q Now, back on this Hiland Dairy transaction, I believe that you said that what you did here with Defendant's Exhibit No. 268 is that you gave 7.5 percent concession in order to equalize pricing. Is that what you said?

A What I said was that – that was the initial deal. The dealer in Springfield was on the deal first. Then Reeder-Simco came on the same deal, even the quantity was a little bit different, actually was reduced a little bit on the Reeder-Simco deal to I think 12 trucks, was basically the same deal. I went back and gave Reeder-Simco the same 7.5 percent I had given Springfield when they submitted their concession request.

Q Well, this is – this does say January 15 of 1998, doesn't it?

A Yes, sir.

Q But you testified that you thought was it was in 1999, right?

A I believe it's in 99.

Q Do you have any – do you know?

A Well, the fact that he was asking for a 2000 model pretty much indicates what the case is.

Q Okay. If this is January 15 of '98, when was it?

A No, 99, sir.

Q I'm sorry, 99. Well, it's January 15 of '99. Let's assume that. Okay?

A Okay.

[841] Q 7.5 percent given to the Missouri dealer, but it would seem to be – what we need to do is look at the date of Reeder-Simco's request, and this is Defendant's 269. Reeder-Simco's request was July 21st of 1999, isn't it?

A Right, and I gave them both – I gave them the same 7.5 I had given Springfield.

Q Okay. About six months earlier?

A Yes, sir.

Q Okay.

A The deal hadn't –

Q So what does that have – what does that say with regard to this difference that a month or two might make with regard to granting concession? It doesn't apply here, does it?

A Probably in this case, no, because the customer – what Hiland Dairy wanted to do it took that long to make a decision.

Q Well, here we are at July 21st of 99, 1999, 7.5 to Reeder-Simco.

A Uh-huh.

Q And I think the point is July 21st and August 19, on August 19 you granted 8.5 percent to the other dealer, didn't you?

A Correct.

Q Is there any documentation or any proof that you granted Reeder-Simco 8.5 percent concession on that deal?

A No, sir. And the reason I didn't is because by that time [842] the deal was done.

Q When you bumped it up to the 8.5 percent to the other dealer, they made the sale?

A Yes, sir. It was a boom-boom-type of deal.

Q It was too late for Reeder-Simco to have a chance, right?

A If memory serves, the dealer from Springfield called and said I got the order, the customer will take it under this provision. I'm sitting in his office. Can you take the deal? Yes, I did, got the order. The order went in on either that day or the next day. So in essence it was a done deal. There's no need to call Reeder-Simco, because the order had already been placed.

Q On the, I believe it was Defendant's Exhibit – Plaintiff's Exhibit 148, you talked about the REC Transport concession request?

A Yes, sir.

Q And how you thought the dealer didn't or the salesman didn't know what he was doing because he quoted 21 percent.

A Yeah. I felt at the time that Greg Bader, who was basically a – spends most of his time on medium duty asked for a concession that was, you know, way out of line.

Q Well, was there a price change in 1998?

A Yes, but this is – the timing really wouldn't explain that.

Q Also, with regard to ARL, we discussed the fact that when Reeder-Simco requested 3 percent, you gave them 3 percent on that [843] transaction, right?

A That's what appears so; yes, sir.

Q Now, let me know show you Plaintiff's Exhibit 184. It's also the ARL, but it was for – this appears to be a bid about six months later, February or longer than that, it's about eight months later, February of 1999 –

A Uh-huh.

Q – where Reeder-Simco requested 10 percent and what was granted?

A 4 percent.

Q If I may have just a moment, I think I –

THE COURT: Yes, you may. (Pause.) Back on the record. Mr. Byars?

BY MR. BYARS:

Q Just a couple more questions. On this Danmar Transit transaction, this is Reeder-Simco's concession request. In this transaction there were no trades, were there?

A No; no, sir.

Q And the sales had a fairly high probability, is that right?

A That in the dealer's estimation, the salesman's estimation; yes.

Q There was a potential for additional sales, it being 60?

A I think that was the size of their fleet; yes, sir.

Q There was no consideration, I guess, with respect to any kind of over allowance or anything like that, was there?

[844] A I don't believe so.

Q All right. And basically it's just a pretty clean deal as far as these factors that you mentioned are concerned, isn't it?

A Clean deal? I wouldn't characterize it that way, but, you know, give you an example, you mention there that the competition was International Harvester, which is usually pretty tough competition to it, so that would be a factor I would consider in the equation.

Q This would also be a Conquest account for Reeder-Simco, wasn't it?

A And for Volvo, too.

Q All right. And so all of these would weigh in favor of granting a higher concession for Reeder-Simco, right?

A Yes, sir.

Q And why would you, instead of issuing 4 percent initially, why didn't you just do that to begin with instead of going back to Reeder-Simco and saying 4 percent and leaving it up to Reeder-Simco to try to plead the case and get an additional percent?

A Well, chances were 4 percent was my, my limit on that particular model and that particular quantity in

accordance with our matrix, and, you know, it's not that the competition tells you where their price is. We go in with a number we think is competitive. Sometimes we are successful and sometimes we're not. And then we'll go back and, you know, bump it or negotiate [845] with a customer and see if we can do a little bit better. There's a lot of give and take in a deal is what I'm saying.

Q In this particular case though, didn't Reeder-Simco inform you of what the price needed to be in order to win the business?

A They asked for 7.84. I'm not sure if that's exactly what was going to take to get the deal or not. I don't recall.

MR. BYARS: Okay. Pass the witness.

THE COURT: Any redirect?

MR. SHANNON: No, Your Honor.

THE COURT: You may stand down. Ladies and gentlemen of the jury, I sometimes encourage attorneys to do things and then maybe I don't compliment them enough when they do do it, but this particular witness, the attorneys do have the Court's appreciation. You will recall he was called last week as a witness for the Plaintiff and then was cross-examined briefly, and today he's been subject to calling as a direct witness on behalf of Defendant and cross-examined by the Plaintiff. In large part they did not ask the same questions they had asked before and that – they have my undying appreciation for that. We are going to take I think just an hour for lunch.

MR. WILLIAMS: Excuse me, Your Honor, before we recess the jury, can we approach the bench on a scheduling issue, just briefly, if I might?

THE COURT: Yes, yes.

MR. WILLIAMS: I think it may help the Court and the

* * *

[850] THE COURT: No objection? That will be admitted. Call your next witness, please.

MR. WILLIAMS: We call David Winner.

THE COURT: Come around, please, Mr. Winner.

DAVID EDWARD WINNER,
DIRECT EXAMINATION, DULY SWORN

BY MR. WILLIAMS:

Q State your full name, please, sir.

A David Edward Winner.

Q Mr. Winner, where do you live?

A I live in Chapel Hill, North Carolina.

Q And where are you employed?

A Volvo Trucks North America.

Q How long have you worked for Volvo?

A Since August 16th, 1999.

Q When you came to work in August of 1999, were you asked by anyone at Volvo to perform an evaluation of the dealers within the Volvo network of the Volvo dealer body?

A Yes, sir, I was.

Q Before we get to that, let's talk just briefly, what are the duties and responsibilities of the Dealer Development Department or area within Volvo?

A The Dealer Development Group looks at the dealer network which distributes probably the bulk of the trucks and parts that Volvo sells. We look at how the dealers are doing. How they present theirselves to the customers, how they represent Volvo, [851] and also we look at their performance which is the determining factor if Volvo is successful as an ongoing business.

Q Prior to August of 1999 had you had any involvement in reviewing Volvo dealers or evaluating their performance?

A No, sir.

Q After you were hired, you said you were asked to review the performance of certain Volvo dealers, what was your purpose in evaluating the performance of those dealers?

A We wanted to evaluate our entire dealer network and what we wanted to do was if we had dealers that weren't performing to our standards, we wanted to upgrade the dealer network and once again sell more trucks, sell more parts, sell more engines.

Q Were you looking at the performance of only certain dealers?

A No, sir. We looked at the performance of all the dealers as a group.

Q How do you evaluate the performance of a dealer?

A The primary three items are truck sales versus objectives, parts sales versus objectives, and engine sales versus objectives.

Q And did you create a document to summarize your evaluation?

A Yes, sir, I did.

Q Okay. (Off the record briefly.) I want to show what's previously been identified and introduced into evidence as Defendant's Exhibit 129-A, and before we get to the content of it, I thought – just would like to zoom in because this is a [852] small document. I apologize to the Court and the jurors, but if we can zoom it in . . . Okay. This is Volvo Truck North America Dealer Business Management Full Year 1999. And I'll try to focus it as best I can on those words. At the top there we have certain columns. Can you just tell me what columns are on there? I'll try to zoom in a little bit closer as well to assist you. Let me refocus. Okay. I'm getting a little bit better. I can almost read that without my glasses. Okay. What are the columns?

A Okay. Going from left to right, the number sign is just is the dealer code. It identifies the dealer. It's, for lack of a better term, our customer number or dealer number. The second column is the region or company from a sales standpoint is divided up into various regions. Within the regions are districts. That's the third column. I'm sorry. I made a mistake. The pound sign was for the number as the ranking. The dealer code is the fourth column actually.

Q Okay.

A The column titled satellites, some dealers have more than one location and we just wanted to identify how many if there were any satellite locations or not.

Q Okay.

A The next column to that is probationary and in that document what that column was it's stated had any particular dealer in the old dealer network been a probationary dealer in the previous, I [853] believe it was three years. The column that says letter sent, we had sent a couple of letters depending upon the status of the dealers, and I believe it notated what date it was. DLROPS is just the dealer operations representative. Although I ran this or I managed this process, there were actually three of us that, or three or four of us, I guess, that handled all of the dealers. And then, of course, city and state was the city and the state of the dealer as we judged the results. Full year truck objective, Volvo sets truck objectives and engine and parts objective by dealer. And that just states what that objective was that was set for each particular dealer.

Q That's their sales objective for the year?

A Yes, sir.

Q Thank you.

A The full year truck actual sales was the actual results versus the objective. And then the next column is a percentage which was just a mathematical equation of how they did against the objective.

Q Okay. And what's the 12/31/99 order board?

A 12/31/99 order board, what that was, we wanted to give full benefit of the doubt to any dealer that may have

had an order in the system where the trucks hadn't been built or something was going to be delivered for whatever reason. If a dealer, for example, fell short, there were a lot of trucks on order, we wanted to be able to visually look at that and make sure we [854] weren't overlooking something.

Q Okay. The next column?

A Full year Volvo power objective. Once again, Volvo also manufactures their own engine, and we set an objective there. And the column beside that is obviously how they performed, what their actual results were, and then once again the percentage, how they did against their objective.

Q Okay. And the next column?

A Full year parts objective. The way we measure parts is also parts purchases from Volvo. It's really the only way we can fairly measure it, I guess, because we sell the parts to the dealer. The dealer in turn sells the parts to the customer. So that's how we measure it. And the parts objective are actual purchases from Volvo. That's how it's measured. That's how the objective is set, and then the next column obviously is their actual performance against the objective, and once more the percent of the objective, so it's a mathematical equation.

Q And what is the last column?

A The last column is where it says 50/50 average of parts and truck objective, what I did, I took all the Volvo dealers at that time, I want to say 167 dealers, and although we have three different categories, truck sales, engine sales, parts purchases, the engine sales are a smaller piece, and the engine sales we originally considered

also doing a third, a third, a third, those three objectives. The only problem with that is some dealers, [855] quite honestly, don't sell any Volvo power. And our main push is really truck sales and parts sales. So that's why, although we noted how much the dealers did on the engine objectives, we truly measured them as we rank ordered 167 dealers, we measured them 50/50 on parts purchases from Volvo and truck sales.

Q Okay. Before you performed your analysis, did you have any prior knowledge of Reeder-Simco GMC, in Ft. Smith, Arkansas?

A No, sir.

Q Did you include any personal opinion or subjective opinions in your evaluation as you did here in your personal opinion?

A No, sir. Actually, I had no personal opinions, and the entire process was objective. It was strictly numbers, because I don't – I, at that time, knew none of the dealers.

Q Okay. Well, let's look at what your results showed. Let me go back out wide for just a moment so we can get – I'll take that off. And does this Exhibit 129-A, does that reflect the results of your analysis?

A Yes, sir. What it is, we rank all 167 dealers and what that page is, that is the dealers, and I can't read the percentage in the bottom right hand corner, but it's just the bottom, the bottom – we went up to that 85 or 95, yeah, we went up to 95 percent objective on that sheet.

Q Okay. Well, let's go back and go back up and see if we can locate Reeder-Simco to make it easier for you and the members of the jury. I've highlighted the line because

of this rather small [856] print, and do you see the yellow line that I have highlighted?

A Yes, sir.

Q And does that represent where the Reeder-Simco dealership placed in this overall evaluation?

A Yes, sir. Of the 167 dealers, they were third from the bottom.

Q Okay. We have the information there we've already talked about, and you have a probationary, yes, 1998. What does that mean?

A Well, basically probationary means that they did not perform up to standard for a particular year. When it says, yes, probationary, 98, that means their performance in 1997 was not up to what our expectations were, so they were put on probationary status for the year 1998.

Q Okay. I'm going to come back to the letter sent column in a a little bit. For Ft. Smith it shows that their full year truck objective was what?

A I believe 85.

Q Eighty-five? And what were their full year actual truck sales?

A It's either 18 or 16.

Q I believe that's 18, if I can make that out.

A Okay. It's 21 percent either way.

Q Okay. So 21 percent of the sales objective that Volvo had set for them is what they actually sold that year?

[857] A Yes, sir.

Q Then you're looking at, for the year end, what was their – were there orders on the order board at that time?

A It looks like two. It was two.

Q And for the Volvo power objective, what was their objective in actual sales?

A Their objective was to sell seven trucks with Volvo power and they sold none.

Q I'm sorry. Seven?

A I'm sorry, 17, and they sold none.

Q But, again, you didn't consider that number in your final analysis, did you?

A In the final analysis, no, sir.

Q Then on parts objective what was their full year parts objective and their full year parts actual?

A Their full year objective was $473,100. And the full year actual I believe is 344,247, which is 73 percent of the objective.

Q And what does that result in when you weigh their parts and truck sales on a 50/50 basis giving equal weight to each, what was their overall objective achievement?

A 47 percent.

Q And is that the number which ranked them third worst of the dealer body?

A Yes, sir.

[858] Q Thank you. Now, after you've completed your evaluation in the Fall of 1999, fall or winter, did you report those findings to anyone else within the company?

A Yes, sir, to my boss, Sam Johnston.

Q And after you reported it to him, were there any further discussions within the dealer development group about the results of your evaluation and what action, if any, should be taken?

A Yes, sir. What we did is we met as a group, Sam Johnston, Terry Billings, myself, Brian Higgons, and Jack Yarbro, which is basically our group, and we made a decision as to our plan of action for those dealers or some of those dealers, at least the ones that ranked on the bottom.

Q Okay. Was there one meeting or was more than one meetings?

A The way I recall, there was one, one meeting.

Q Okay. And as a result of that, what decision was made regarding Reeder-Simco?

A Regarding Reeder-Simco, we made the decision to terminate their dealership.

Q I want to go back, and I noticed that looking at some other dealers, one of them ranked actually a little bit lower on the number than Reeder-Simco. I want to talk to you about that. Did you decide to send out proposed termination letters to all of the dealers on this list?

A What we did, if the dealership had been prior probationary, which is reflected as 98 or 99, as you look down the probationary [859] column, if they had been

previously probationary and had also failed in meeting their objectives below the 80th percentile in calendar year 99, they were sent a termination letter. If they had not been probationary in previous years, then they were put on probation for the calendar year 2000.

Q Okay. So how did, how did that apply to Reeder-Simco?

A Since they had been previously on probation, we decided to terminate them.

Q Okay. So did you consider only their performance during the calendar year 1999 in making the decision on who would receive a termination letter?

A No, sir. We would have looked at 99, 98, and 97.

Q After December of 1999 or during December of 1999 you said a letter was sent to them, correct?

A Yes, sir.

Q And after that letter was sent, was Reeder-Simco actually terminated as a dealer by Volvo?

A The intent of our letter was to terminate them, but we never terminated them.

Q Can you tell us why?

A Reeder-Simco filed a protest in the State of Arkansas protesting the termination.

Q And what effect did that have?

A We could not terminate them until the proceedings were resolved.

* * *

[874] Q Yes. I asked you with respect to the dealerships who fell within the category of being terminated, what was Volvo's plan or was there a plan to replace those dealerships with other dealerships? And your answer was we didn't have a plan on who we would replace them with or how we would replace them, but we did understand that we were – let's see. This was 99. We did understand we were in a strong truck market, and we felt that we would not have trouble recruiting candidates. Was that your testimony?

A Yes, sir.

Q So what was the heavy truck, heavy truck market like in 1999?

A I believe 99 was pretty much a banner year.

Q All right. And what about for 2000?

A 2000 was another very good year. It started to fall off towards the end of the year, I believe. I'm going say the first three quarters of 2000 were very strong, similar to 99.

Q Now, in determining which dealers would be cut, was consideration given for performance of the dealers prior to 1997?

A I had no prior knowledge of that. In our meeting, we did discuss that, but I do not recall what the results of those discussions were.

Q Under the new proposed dealer agreement, is there a methodology which would allow Volvo to terminate the dealer prior to the expiration of the five-year term?

[875] A I'd have to look at the agreement. I was – I was involved with authoring that agreement, but I'd really

have to look. I believe we still have similar language about a probationary program.

Q Well, doesn't that also allow for early termination, not just probation?

A Are we talking about the new agreement, sir?

Q Yes.

A I believe you're accurate, but, once again, I'd like to see it to verify that.

Q Does the dealership or the dealerships have any control over setting the objectives under the new agreement?

A I think there's always interaction between the sales group and the marketing group and the dealerships on those numbers. In the dealer agreement, I believe we say that Volvo will set those objectives.

Q You indicated that there was about 166 or 167 dealers on the report. How many dealers are there now?

A I want to say 145 or so, maybe 150.

Q Has there been an increase in the dealerships that have more than one point?

A Yeah. I believe there has been some of that. We've gone through a pretty tough year. The last year, 15 months or so, some dealerships have gone out of business. Some of the more financially-strong dealers that have done well performance-wise [876] have taken that opportunity to add points. So I think there's been some of that, and, here again, I'm guessing on the 145 and 150. I just don't have that number right now.

Q In your letter you indicated, I believe, that for 2001, the – well, I'm sorry. Looking back here at Plaintiff's Exhibit 105, the parts purchase objective there of Reeder-Simco, you see that?

A Yes, sir.

Q 344,247?

A That's actually their actual results.

Q Actual results?

A Yes, sir.

Q The objective was the 473,100, right?

A Yes, sir.

Q Do you know where Reeder-Simco stood with respect to its actual parts purchases in prior years?

A I do not recall, sir, no. They would – that would have been taken into consideration in the previous years when they were put on probation.

Q Well, was that, that 344,247, was that one of the highest levels of parts purchases that Reeder-Simco had ever had in its history?

A I do not know, sir.

Q And do you know how the parts purchases objective was determined for Reeder-Simco?

[877] A My understanding is that our parts group looks at total vehicles in operation in a given market area or area of responsibility and there's some formulation involved in parts usage. I believe they also look at past sales performance and I don't have a formula on that, but I

do know they look at vehicles in operation and past sales performance.

Q Do you know what it means to be able to drop ship parts?

A Yes, sir. In our company, to be able to drop ship would mean that, for example, a dealer would have a customer in another location and the customer was of the type where the dealership didn't want to handle the parts. In other words, they didn't want to have the parts come and then physically take them to the customer. So in a drop ship situation, the dealer would order the parts and have the freight company go from the Volvo Distribution Center directly to the customer's door and deliver the parts directly to the customer.

Q And under that scenario, does that dealership, even though the parts aren't shipped to the dealership, does that dealership get credit on its part purchases objectives for having those parts drop shipped to the other location?

A As far as I know, yes, sir.

Q Okay. Do you know whether Volvo denied the drop shipping ability to Reeder-Simco with respect to the recent ABF transaction?

A The only possibility could be that we restrict drop ships in [878] other dealer's AOR's. For example, if Reeder-Simco's AOR includes the City of Ft. Smith, because I don't know my geography here, a dealer in Chicago cannot drop ship parts into Reeder-Simco's AOR. We would deny that because that would be – I don't know what you would really call it, but we just don't do that. So you can drop

ship either into your own area of responsibility or you can drop ship into an open area where there is no assigned dealer. So that would be the only reason that I would know of that they would be denied.

MR. BYARS: One moment, Your Honor.

THE COURT: Yes, sir.

MR. BYARS: Pass the witness.

THE COURT: Any redirect?

MR. WILLIAMS: No further questions, Your Honor. May Mr. Winner be excused?

MR. BYARS: Yes.

THE COURT: You may stand down. May this witness be excused, Mr. Byars?

MR. BYARS: Yes, Your Honor.

THE COURT: You may stand down. Have a safe trip home and be careful. Do you have your next witness here?

MR. WILLIAMS: Yes, Your Honor. Dr. Don House.

THE COURT: Okay. Just a minute, Dr. House. You-all want to take a quick break before we hear the next witness? We're finding that more and more of you are voting as we go along

* * *

[990] PLAINTIFF'S REBUTTAL EVIDENCE

BILL HECK, DIRECT EXAMINATION, PREVIOUSLY DULY SWORN

BY MR. BYARS:

Q Bill, you recall testimony from Tom Burke wherein he testified on the subject of additional concession being granted to dealers to help reduce inventory when an order is cancelled by [991] a customer?

A Yes, I recall what he said.

Q Has Reeder-Simco had a situation where a customer cancelled an order?

A Yes, we did.

Q And on what transaction was that?

A That was the last New-Hiway Express transaction.

MR. BYARS: Okay. Your Honor, I believe Plaintiff's Exhibit 128 has been admitted.

MS. PORTER: Which one?

MR. BYARS: Plaintiff's 128?

MR. SHANNON: It would be 128-A.

MR. BYARS: I'm sorry. 128-A.

THE COURT: It was also.

MS. PORTER: Yes.

Q Mr. Heck, what was this Exhibit, 128-A?

A That was a representation of an invoice on one of the last trucks of that original order.

Q Okay. And what happened with regard to some of the trucks in this order? First of all, how many trucks were included in this overall order?

A Originally it was 85 trucks, sir.

Q Okay. And what happened?

A In the process of New-Hiway Express transferring assets, or however they sold themselves to MS Carriers, MS Carriers was not [992] willing to pick up the balance of this contract, and so New-Hiway Express advised me of a certain time they would not be able to take any additional trucks. And I took steps to figure out how to try to stop them or what I was going to do with these extra trucks. It was originally eight. They could take 77, but they could not fulfill their contract for all 85.

Q So you had to request that eight be cancelled with the factory?

A Yes, sir.

Q And then what happened?

A Well, they had bid – we were able to cancel four of the eight by paying a cancellation penalty, which was a rule that had been created since this order was placed, but we paid a cancellation penalty on four of the eight, and we took, we took the other four of the eight into inventory approximately May or June, probably June, yeah, June.

Q So the customer cancelled and then you took those trucks into your inventory?

A Yes. I had no choice.

Q Okay. Let me show you what was marked as Plaintiff's Exhibit No. 28. What is that?

A That's a memo from this electronic memo system that it's a confirmation from a Russ Tedder of what we agreed to do about these extra trucks as far as concessions, but it's a memo from Russ Tedder, copy to me and Mike Truta.

[993] MR. BYARS: Okay. Your Honor, we move for the admission of Plaintiff's 28?

THE COURT: Any objection?

MR. SHANNON: No objection.

THE COURT: It will be admitted.

Q Twenty-eight says, Bill, as we discussed, you may be stuck with eight Hiway tractors that they cannot accept, and he lists the serial numbers. If this is the case, we will back the concession level back to 20 percent; if you can move all eight at one shot, we will go 21 percent. Just let Mike or me know when this takes place so we can adjust accordingly, is that right?

A Yes. That's – that's –

Q What was your initial total concession on this 85-truck order?

A 25-point, 25-point something.

Q Okay. And this memo indicates that they – that Volvo is going to charge back the concession?

A Not exactly. What he was indicating there was to plan on having 20 or 21 percent, but when I actually sold them, that's when they would go in and do the adjusting; in other words, they would charge me back the 20 or 21 percent when the sale occurred.

Q Okay. So what happened in the interim, I mean with these cancelled orders?

A Well, we had them in inventory and at the same time, among all of these letters we had been receiving this period of time, [994] we got a letter that we weren't living up to our end of the bargain in stocking and selling VN's –

MR. SHANNON: Your Honor, may we approach on this issue?

THE COURT: Yes, sir.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. SHANNON: Your Honor, I don't see how this testimony is – using this Exhibit I believe rebuts any testimony that the Defendant's put on.

MR. BYARS: Your Honor, this has to do with Tom Burke's testimony whereby other dealers after the fact got increased concession for cancelled orders, and what we're showing here is that Reeder-Simco actually got a decrease in the concession on similar cancelled orders.

MR. SHANNON: I don't see how this Exhibit or this line of questions applies to that at all.

THE COURT: Well, I'm going to permit it. I'm going to overrule your objection. I'm going to permit it. You may continue.

(The following proceedings were had within the presence and hearing of the jury:)

Q Let me back up, Mr. Heck. When these orders were cancelled and you took certain trucks back in inventory, what kind of trucks were these?

[995] A These are VNL64 T 610's to the specifications of Hiway Express. You know, you might call them fleet trucks.

Q And the VNL, was that a new product or the VN 770, was that relatively a new product for Volvo?

A Well, the VNL 64 T 610, when this Order was placed, was a brand new product. We ordered these trucks on a handshake with a a customer. We were the first ones to get an order for the VN in.

Q And so after you took these trucks in inventory, what happened next concerning these?

A Well, financially we got a charge back on our parts account for the sum total for the four trucks of approximately $35,000.

Q What does that mean? How did that happen?

A They decided to charge us back the concession. I don't know why.

Q Well, explain to the jury what it means to charge back your parts account. They may not understand that.

A Oh, oh. Well, we had the units on a floor plan at a certain amount of money that reflected the price we paid for the trucks. So that price included the concession amount of 25 some odd percent, you know, whatever that is in dollars, I don't have it in the top of my head, but when they decided to adjust the concession to a lower amount which was approximately 15 percent, that was over $8,000 per truck. And instead of adding that to our floor plan balance, they just added that to our parts [996] account. Every month we clear an account with them. We buy parts and do warranty. It's a clearance account. We ordinarily have to pay money on that account.

Q All right. And so I guess it was a charge to your parts account of how much money?

A Approximately $35,000 for all four. It was 8,000 some odd dollars each.

Q And then at some point in the future, were there any sales of these trucks that you had to take back into inventory?

A Yes. Vaughn Drum arranged a sale to Mr. Youngblood's company, Southwest Financial Services, Southwest Distribution in Alma, Arkansas.

Q All right. And what concession were you permitted with regard to those trucks, the sale of those trucks?

A Approximately 20 percent, so we received a credit of 4,000 per truck which would be about $16,000, and this probably took place in November, as my memory serves, and we also gave back the premium warranty that was on these tractors. There was $3,000 premium warranty included in the base price of these particular trucks, and

we gave that back to be able to obtain the price level that Mr. Youngblood was able to fit into his business plan.

Q Okay. So what was the net effect with regard to these four trucks that you had to cancel because your customer, New-Hiway, could not accept the eight?

A Well, we went from 25 percent to 15 percent to 20 percent. [997] So our experience with cancelled orders was that they charged us back, not that they gave us more money.

Q And there were some comparisons that were put on the board and commented on by Mr. Burke whereby these other dealers received a higher concession when there was a cancelled order, is that correct?

A Yes. They were not charged back the initial amount in any form and they were given more money.

Q Now, that process of what these other dealers were able to obtain with the concession, is that consistent or in compliance with Volvo's sales policy dated October 31, 98, which is also Plaintiff's 69?

MR. SHANNON: Your Honor, I would object to that question.

THE COURT: It's overruled.

A No.

Q Okay. What does the policy state should happen in those circumstances?

A The last paragraph, any change in the status of the ultimate purchaser of specific vehicles as listed in the RSA gives cause for VTNA to adjust, modify or otherwise

deny payment and/or to charge back to the dealer a portion or all of the amount granted.

Q And is that what happened with those other dealers, the charge back?

A No. They weren't charged back. They got more.

In the United States District Court
Western District of Arkansas
Fort Smith Division

Docket No. 00-CV-2031 (RTD)

[Caption Omitted In Printing]

DEPOSITION OF
HUGH SAMUEL JOHNSTON

At Greensboro, North Carolina
Tuesday, May 22, 2001
4:12 p.m.

Reported by: Ramona J. Crouse

[Read into the record at trial on January 15, 2002]

* * *

[28] Q. Okay. And who quit?

A. Barbara Rosetti.

Q. Okay. What was – what were her job duties when she quit?

A. She was in charge of an area of the country in terms of handling the dealers and monitoring their progress and taking care of the – taking care of the buy-sells.

And then the other thing she did was the dealer sales and service agreement, and she also monitored the probationary dealer list.

Q. Okay. So what did you ask Mr. Winner to do in terms of evaluating or looking at dealer performance?

A. Just that: to compile a list of the dealers' performance.

Q. And did he do that?

A. Yes, he did.

Q. What did Mr. Winner provide to you?

A. A list of the dealers. I don't know if you have the list, but I think the list had on it sales objectives and percent of objective towards – or percent of completion towards that objective, as well as parts and engine sales on it too – I believe was on the list.

[29] Q. And did Mr. Winner advise you or did you know what data he reviewed in coming up with that list?

A. Yes.

Q. Okay. Which one was it? Did he tell you or did you – do you know or even instruct him on how you wanted that done?

A. I don't remember which way we did it. I really don't at this point.

Q. Okay. Do you remember today what data he actually looked at in evaluating or compiling the list of dealer performance?

A. No, I really don't remember.

Q. Okay. Did you have any meetings with David Winner concerning his findings, the results of his analysis?

A. Yes, we did. Yeah.

Q. What was the purpose of that?

A. Actually, I believe the meeting was with everybody in the department, and the purpose was to create an objective standard on how to review what nonperformance and performance was.

Q. At about this time is it true that the dealer sale and service agreements which were in existence were either coming up for renewal or expiration?

A. By "coming up," if you mean within a 12-month [30] period, yes.

Q. Okay. And what date was that?

A. They were – the renewal was in – well, the dates actually varied depending on the state statute.

Q. But, generally speaking, you were looking at the nationwide network of dealers who basically had the same dealer sales and service agreement. Is that true?

A. It depends on what you mean by "looking at."

Q. Well, in late '99 is it true that every dealer in the United States had a substantially similar dealer sales and service agreement?

A. Yes.

Q. And at that time was it also true that those agreements were set to expire in March of 2000?

A. Yes.

Q. Okay. And was it – was one purpose of having Mr. Winner perform his analysis to determine which dealers would be offered a new agreement and which ones would be canceled or terminated?

A. Yes.

Q. Okay. And was that a purpose that was discussed with Mr. Winner before he undertook this task?

A. I don't know if it was or not.

Q. Okay. If he – well, you were Mr. Winner's [31] supervisor. Right?

A. Yes.

Q. Did Mr. Winner report to anybody else?

A. No.

Q. Okay. Would he have received any instruction directly from Mr. Patterson, for example?

A. He could have. I don't know.

Q. Okay. Did you have – correct me if I'm wrong, but I think you stated that you just don't recall now what information – what data he looked to to compile the list. Is that right?

A. Yeah. Anything I would tell you would just be an educated guess, because I don't recall now.

Q. Okay. And did Mr. Winner report his results to you in writing?

A. Yes, he did.

Q. And what was that writing? What did it look like?

A. It looked like a chart. It was a list of dealers and had their objectives on it and whether they – and where they were on making that objective.

Q. Okay. I think Mr. Winner referred to that as a spreadsheet.

A. Okay.

Q. Did you have a particular name for that document, or did you just –

[32] A. I don't think we had a name for it. We may have. I'm sure we did.

Q. Over what course of time did Mr. Winner compile that list?

A. I'm not sure of that.

Q. When Mr. Winner had completed the preparation of that list and brought it to your attention, how soon after that did you meet with Mr. Winner to discuss the outcome of his recommendations or what the dealer development group would be doing with the dealerships?

A. It was a reasonably short time after that, and it was with the whole group of the dealer development people that we met.

Q. Okay. Who – and tell me who was in that group.

A. It would be Terry Billings, Brian Higgins, David Winner, of course, and Jack Yarborough. I'm sorry. Y-a-r-b-r-o-u-g-h. I think he actually pronounces it "Yarbrough."

Q. All right. And was this spreadsheet that Mr. Winner prepared distributed among everybody in the group?

A. Yes, it was.

Q. Okay. And was it in one meeting or was it in a series of meetings that decisions were made as to [33] what would be done with each dealer?

A. I believe it was in a series of meetings.

Q. Okay. Over what course of time?

A. Several weeks.

Q. And was Mr. Winner's analysis given substantial weight in the decisions to cancel and terminate dealerships?

A. Yes, it was.

Q. In fact, was each – the way I understand it, the spreadsheet had a group of dealerships which were recommended for cancellation or nonrenewal, another group of dealerships that would be on the list for probation, and another group that – when they were unsatisfactory – had a satisfactory performance level. Is that correct? Is that true?

A. Yes. Yeah, I think that is correct.

Q. Okay. Was each dealer which Mr. Winner had set up – or placed in a group to be canceled or terminated actually canceled or terminated?

A. I'd have to look at the list. I don't recall.

Q. All right. Was Reeder-Simco among the dealerships in the group Mr. Winner had for cancellation or termination?

A. Yes, they were.

Q. Do you recall any specific discussion as to the [34] decision to cancel or terminate Reeder-Simco as a dealership?

A. I don't recall any specific conversation about that.

Q. Okay. Do you recall whether, with regard to any of the dealers on the group – included in the group to be terminated – whether any further investigation or analysis was made beyond Mr. Winner's analysis as to whether or not they would be retained as a dealer?

A. Well, I know we had discussions about that, and I don't recall whether we did additional analysis or not. But there were discussions on each dealer.

Q. Is it fair to say that the decision-making process pertaining to how – I guess looking at the numbers for the dealerships and how those numbers compared to the objectives which had previously been given to the dealer?

A. Yes.

Q. Okay. And was any discussion or analysis done with respect to how those objectives had actually been previously set for the particular dealer or dealerships?

A. Yes, there was discussion on that point.

Q. Okay. And tell me the – what you recall about [35] that.

A. Again this is recollection, but I think we went through to make sure that the objectives were reasonable in comparison to the other dealers' objectives.

And we also looked at the performance over a several-year period, not just the – you know, not just one year. So

we went back and looked at what their performance had been prior and how long they had been on probation. We also looked at that.

Q. All right. Do you know how long – what – for what period of time the dealer's performance was reviewed?

A. As I recall, we reviewed those performances of dealers that had been on probation for whatever length they had been on probation.

And I think in Reeder-Simco's case they had been on probation for a couple of years, so we reviewed – we probably reviewed it – and, again, I'm just trying to recollect, but I think we probably reviewed those years that they were on probation as well as the other dealers that had been on probation for a significant amount of time.

Q. All right. Was any consideration – well, let me ask you this: Was a decision made to terminate or [36] cancel Reeder-Simco as a dealership?

A. Yes.

Q. Okay. Let me have you look at Plaintiff's Exhibit Number 54.

A. Okay.

Q. What is that document?

(Deponent peruses document.)

A. This document was sent to Reeder-Simco to inform them that we were concerned that they may not meet their objectives and to give them some time period in

which to hopefully meet those objectives prior to us issuing a termination letter.

Q. Okay. And is it your understanding that Reeder-Simco was in fact terminated as a dealer by Volvo?

A. I – you know, I don't think I can answer that. And I'm not trying to be evasive. But it's mine that a letter was sent but we did not terminate them. That's my understanding, but I'm not a lawyer, so I don't –

Q. What was your intention – what was your intention in having this letter submitted to Reeder-Simco?

MR. WILLIAMS: Object to the form.

A. Our intention was that he would sell a lot of trucks and sell some parts and thereby meet his [37] probationary terms, and then we could take him off probation.

Q. Do you know whether that happened?

A. No, it did not.

Q. So in your mind at this time frame, was Reeder-Simco – was a decision made to terminate or cancel Reeder-Simco as a dealer?

MR. WILLIAMS: Object to the form.

A. The decision was made to send him a letter of termination.

Q. Okay. And who made that decision?

A. That decision was made by me, and I believe it was signed off on by Chris Patterson.

Q. Did you actually conduct your own analysis, or did you rely upon Mr. Winner's analysis in your decision to have a termination letter issued to Reeder-Simco?

A. I relied on Mr. Winner's analysis.

Q. Okay. All right. Do you recall whether there was any discussion among the group as to whether Reeder-Simco had significant fleet sales prior to 1997?

A. I don't recall if there was that discussion or not.

Q. Okay. Do you have any involvement with the development of national accounts?

* * *

[46] transaction price, so whatever, multiplied, that would be.

Q. Okay.

A. But currently it's not at three percent. It got up to 2.8 percent, and because of the used-truck difficulty the market is in, I believe it's dropped precipitously from that number.

Q. Could you comment generally on what the general market was for Class 8 new – new Class 8 trucks in 1995?

A. I have not a clue.

Q. What about 1996?

A. I wouldn't know that either.

Q. What about '97?

A. I wouldn't know that either. I was selling GMC medium-duties.

Q. What about '98?

A. '98 was a good market, as I recall. I think it was in the upper 100s.

Q. And then '99?

A. '99 was our record year, I believe, so I think we got up to – not counting – if you do North America, I think it got over 300,000, which includes Canada.

Q. And in 2000?

* * *

[52] Q. Okay. Had you – have you heard – been a party to or have you heard any discussion concerning that the Volvo challenge – or that one of the challenges to Volvo is that Volvo has too many dealers? Has that statement been made to you at any time since you've been employed with Volvo?

A. I don't think so.

Q. Would that reflect the policy of Volvo, that it had too many dealers as of that time frame?

A. The policy of Volvo was that we wanted to reduce the number of dealer operations and increase the number of dealer points for the purpose of driving out – costs out of the dealer network. That was what our stated intent was.

Q. Okay. Repeat that. I'm not sure I'm following you. Reduce the number of dealers –

A. Uh-huh.

Q. – but increase the number of dealer points?

A. Correct.

Q. What do you mean by that?

A. You would have fewer dealers that would own more points.

Q. Fewer number of owners which would have a greater number of facilities?

A. Yes.

[53] Q. And what would the purpose of that be?

A. To reduce costs in the distribution system.

Q. How would it do that? What's the theory behind that?

A. The theory behind that is, for example, you would only need one accounting system and it could handle multiple locations. You would increase your ability to perhaps buy supplies, etcetera, because you'd have scale. It's really based on scale.

Q. So when you're – when you're talking about the reduction – okay.

Has Volvo – do you know whether there's been a policy or direction towards Volvo attempting to acquire, as part of that theory, more company-owned dealerships or company-owned stores, so to speak?

A. That was not our intent. It's not based on that philosophy, no.

Q. What was it? Just to assist currently certain dealers to acquire other dealerships?

A. Yes. It was to assist high-performing dealers to require – to acquire lower-performing dealers.

Q. Okay. And has that ever been, you know, announced or discussed with some of the lower-performing dealerships: "Look, guys, you're not performing very well. What we'd like to do is come in and [54] offer you a fair price for your dealership"? Is that done, or is it just a methodology by Volvo just to run them off, terminate them?

MR. WILLIAMS: Object to the form.

A. Yes/no.

Q. Okay. Is it fair that one method Volvo is attempting to utilize or has attempted to utilize is simply to cancel or terminate dealerships such that there is no obligation to come in and pay the reasonable value for that dealership?

A. No.

Q. But you are saying that there have been occasions where Volvo has approached nonperforming dealerships or dealerships who have been performing poorly and said, "You're not performing well. We would like to offer you a fair price for your dealership"?

A. Yes. That's true.

Q. And when has that occurred?

A. On multiple occasions.

Q. Has that occurred with Reeder-Simco?

A. We can't talk about that.

MR. WILLIAMS: I'll object to the form. Let's take a break. Go off the record.

(Off-the-record discussion.)

[55] Q. Prior to Reeder-Simco initiating any litigation against Volvo, was there any attempt by Volvo to approach Reeder-Simco as a dealership and pay a fair price for the dealership such that, I guess, a higher-performing dealership could take over that location?

A. No.

MR. WILLIAMS: Just a minute. I object to the form.

You can answer, but I object to the form.

A. No.

Q. All right. But was that done with other dealerships?

MR. WILLIAMS: Object to the form.

A. Was what done with other –

Q. Was there – well, prior to the initiation of the litigation by Reeder-Simco in this case, were there attempts by Volvo to approach nonperforming dealerships and make offers to those dealerships to facilitate a purchase, pay a fair price for the dealership such that another dealership could take over?

MR. WILLIAMS: Object to the form.

A. Yes.

Q. Okay. And where did that occur, in what [56] circumstances, and what dealerships were involved in that?

A. I'd have to – I'd really have to go back and think about which dealerships. And in most cases the circumstances were based on confidentiality, so I don't know that I'd be able to tell you that.

And I think I'd better check with our counsel to see how much I can tell you, because I don't – again, with confidentiality, I'm not sure. But almost every case we signed a confidentiality agreement, so I probably need to check that.

Q. Well, given that there was – and correct me if I'm wrong or I mischaracterize what you've said, but – correct me if I'm wrong, but given that there was an intention on the part of Volvo to acquire or pay a fair price for nonperforming dealerships, what did Volvo utilize as a multiplier in determining the fair value of the dealership to be paid?

MR. WILLIAMS: Object to the form. And I guess we need to raise – I don't know. We may need to confer with him to what degree – he's already said he thought there were some confidentiality agreements involved with the other dealerships. Why don't we take a break and let us talk about it?

* * *

In the United States District Court
Western District of Arkansas
Fort Smith Division

Docket No. 00-CV-2031 (RTD)

[Caption Omitted In Printing]

DEPOSITION OF
CHRISTOPHER WILLIAM PATTERSON

At Greensboro, North Carolina
Wednesday, May 23, 2001
8:47 a.m.

Reported by: Ramona J. Crouse

[Read into the record at trial on January 17, 2002]

* * *

[0059] Are you familiar with that?

A. (Shakes head from side to side.)

Q. Has Volvo ever utilized or submitted a marketing and financial plan – or what was entitled a "Portfolio of Criteria" to a dealer after 1995?

A. I don't know.

Q. Look at page 5 of Exhibit 2. There's what's entitled a – I'm sorry. I'm on Exhibit 3.

A. Page 5 of Exhibit 3?

Q. Yes, sir.

A. Okay.

Q. It's entitled "1994 Forecast of Operations." Do you see that?

A. Yes.

Q. There's a column entitled "Gross Profit," and it says, "WhiteGMC" and Class 8 Volvo New Trucks, $2,000 per unit.

A. Yes.

Q. Is that gross profit figure a reasonable gross profit figure a dealer can expect in selling Volvo trucks?

MR. WILLIAMS: Object to the form.

A. I would respond to it in this fashion: that that particular gross profit figure is very low.

Q. It's a low profit figure?

[0060] A. Yes. That's a very conservative –

Q. What would your expectation be with respect to the gross profit a dealership receive per truck in the sale of Class 8 heavy trucks?

A. Let me respond to that by saying that the dealership's gross profits have eroded in the past 18 months because of market conditions, but four and a half percent is the average gross profit recorded by all Volvo dealers.

And while I don't have a precise average retail selling price for the vehicles, I would hypothesize – and I think I'm pretty close – it'd be somewhere in excess of $80,000. So that would suggest a gross profit figure of about $3,500, or perhaps higher than that, would be more typical.

Q. Okay.

A. So without – that's pure objective data. That's not value judgment.

Q. All right. And you know that to be a fact?

A. Yes.

Q. All right.

A. Other than the precise retail selling price at the retail level, but it's going to be in the range of that 80,000 to 85,000 dollars.

Q. All right. If you would look, please, at the

* * *

[0098] Q. Well, to place all of the dealers on an even playing field with respect to sales of trucks and obtaining truck pricing, why not give the matrix documents to the dealers so that the dealers know at what discount they can obtain trucks?

A. Because there are a number of other factors that influence – and not all are listed here, but there are other factors that influence our determination over and above what is – and the dealers do have a baseline price.

We have an MVP program for stock orders and for one-offs that provides a bundle of services and warranties and so forth to the dealers. But when a request is made outside of that program, there are a number of other elements that have to be considered, some of which are not listed there because they're not necessarily in the – even in the frame of the region salespeople. They're things that change.

Q. Okay. Well, I'm talking about the requests which would fall within the district manager's or the regional vice president's authority.

A. Uh-huh.

Q. Why not provide the matrix documents to the dealers such that the dealers will know the amount of [0099] concession request they can make, given a particular transaction?

A. You're concentrating on one small element of the transaction, Counselor. The dealers have a fixed price that's uniform across all dealerships that they can purchase trucks at.

When they contact us to seek further assistance, there are a number of other elements that we – and we may well choose not to provide the further assistance.

This permits us some flexibility to deal with specific situations as they arise, but this is not a blanket pricing-relief situation. You fundamentally misunderstand the nature of how this business is transacted.

Q. Dealer makes a – dealer A makes a concession request of – let's say for a VNL 770, and he's got ten trucks. And he makes concession request to his district sales manager of ten percent.

That district sales manager will go back to the dealer and say, "I'll give you seven." And I'm referencing Plaintiff's Exhibit 93 for this example. Okay.

The maximum authority that that district sales manager may have on that transaction is –

[0100] A. 6.4 plus –

Q. – 8.6 percent. Is that right?

A. Uh-huh.

Q. So the district sales manager has authority to do that, doesn't he?

A. Yes.

Q. Okay. And let's say dealer B goes to the district sales manager and says, "I want a 15 percent concession," same model, same number of trucks, and the district sales manager says, "I'll give you 8.6 percent."

The district sales manager has authority to do that, doesn't he?

A. The district sales manager is required to confirm back through the – today this process is thoroughly automated. That's why the calls are placed and why we solicit information about who the customer is, how many trucks are involved, specifications –

Q. I'm not talking about the same customer.

A. Oh, okay. Within a given – yes, that's correct.

Q. Okay. Doesn't that process allow for the dealers to get differing prices – different prices? One dealer gets an advantage over the other dealer in price for a substantially similar sale?

[0101] A. Not –

MR. WILLIAMS: Just a minute.

I object to the form.

A. Yeah. Not for the same customer, no.

Q. I didn't – I didn't say the same customer. We have dealer A and dealer B. Dealer A makes a concession request of ten percent for the sale of ten trucks to customer X.

A. Uh-huh.

Q. And the district sales manager says, "I'll give you seven percent."

A. Right.

Q. Dealer B goes to the same district sales manager and says, "I want 15 percent concession on customer Y – for a sale to customer Y," same model, same volume of trucks.

A. Uh-huh.

Q. The district manager, in that scenario, has the authority to tell dealer B that "I'll give you 8.6 percent." Is that correct?

A. That's correct.

Q. So how does that not result in a disparity in price between dealers in a substantially similar transaction?

A. Well, it does.

[0102] Q. It does?

A. Uh-huh.

Q. Okay. And that happens, doesn't it?

A. Yes.

Q. And it's happened to Reeder-Simco, hasn't it?

A. I don't know that for a fact, but certainly the way that we do business, that is a prospect.

Q. Now, does it make sense to you that if dealer A and dealer B both know that the concession level is 8.6 percent, they're going to be on the same page, the same playing field, for each transaction?

A. If all trucks were identical, if they were like this coffee mug here and they were all black coffee mugs, then that would make sense. But they are not.

And, matter of fact, we frequently find ourselves in situations where customers, because these customers are very mobile, will go to two or three different dealerships, they will ask for concessions on trucks, and we will find that there's a difference in the calculated list price, which is a function of what the dealer interprets the customer's requirements to be. That can be off by two or three percent all by itself

So in fact what we're talking – you're [0103] assuming like, kind, and quantity to apply to a VNL 770. The trucks are not identical, nor is our profit margin on variations in the specifications identical either.

So in theory and in the abstract form, you are correct. Some price discrimination may – could conceivably exist. But even where two dealers are quoting exactly the same fellow on what that customer believes to be identical trucks, they aren't. The requests will come in and there'll be significant differences in what the content of that vehicle is.

Q. Why then are there not further breakdowns to the district sales managers to equalize price to the dealers

other than just the model number and the volume of trucks?

A. Because when we get into more complex situations, we need – the body of knowledge that the group that works for Selwyn Feaster has is much too extensive to have – to continually and chronically update for an entire field organization.

We have made considerable progress with the online – what's known as the RSA system, but it is not practical to do as you described. If would be if I were selling coffee cups.

* * *

[0108] chosen simply to stay in Greensboro and stay as the president of Volvo Trucks North America, the span of responsibilities would have been narrowed because some activities between Mack and Volvo and Renault were being consolidated.

So he made a career choice to – he didn't wish to relocate, and he did not wish to continue in a role that his heart wasn't in. So he chose to pursue other career opportunity.

Q. Are you aware of a statement made by Mr. Gustafson at a dealer conference in Marco Island, Florida, to the effect that 50 percent of the Volvo truck dealers would not be in business in the next few years?

A. I recall that speech, yes.

Q. Okay. He in fact made that statement?

A. Uh-huh.

Q. Do you recall what else was said in making that statement?

A. It was a general statement of the changes that we – at that time we foresaw in the industry, many of which have come to pass, and a logical continuation of trends that had been evident for some time in our business and the automotive business in general.

[0109] Q. Which was what?

A. That there has been consolidation in suppliers, there's been consolidation of manufacturers, as evidenced most – close to home by the fact that Renault gave up building trucks, and that there's been consolidation in dealerships as well.

Q. And how did the consolidation of dealerships occur?

A. Variously, dealers go out of business in difficult times like this, or many dealers are in financial stress and some are either forced out of business or choose to give up the business voluntarily.

In other instances some dealers choose to – or some dealers establish that they wish to grow and they will seek to purchase adjacent dealerships or, in some cases, dealerships in totally distant parts of the country to broaden their base of operations.

But it's a reflection of larger trends in the economy as a whole.

Q. Has Volvo sought to facilitate the process of consolidation of Volvo dealers?

A. Can you be more specific?

Q. Well, is there any policy or – I don't know if that's a fair term, but desire or action planned by Volvo to have other Volvo – have Volvo dealers [0110] purchase or buy out lesser-performing dealerships?

A. There have been – due to current economic conditions, the pace has slowed somewhat. But, yes, we have sought to facilitate the – what is the term? – the consolidation, the agglomeration of dealers into larger business units.

And when I say facilitate, that's making certain investments to encourage that to take place. Our overriding objective – and that, I believe, was the gist of Mr. Gustafson's speech – is if the profitability of the dealer network is not satisfactory – and to broaden that somewhat, it's not satisfactory for the manufacturers, for the suppliers – in today's context, even the customers aren't terribly profitable.

And in order for the company to be successful, the dealer network as a whole has to produce substantial returns for investors. And with the conditions that we face in the marketplace and the evolution of both the customers, which are consolidating at a rapid pace, and also the increasing transparency in pricing that's been facilitated by things such as the Internet and inexpensive communication and so forth, many dealerships that were in smaller-market-potential [0111] areas were having a difficult time generating a satisfactory return for their investors or, conversely – or in many cases were losing money, which is not a sustainable situation for anyone, whether it's a huge company like Volvo or a small dealership in Yakima, Washington, or somewhere.

So, yes, we have sought to influence – to try and stay ahead of the economic trends and have enjoyed some success in some areas in doing so.

Q. Well, does that also include Volvo purchasing dealerships to become company stores?

A. No. Volvo has a policy. It does not seek to engage itself in the retail business for a variety of reasons.

So in instances where we have – and there have been instances recently, against a backdrop of a market compression of over 50 percent in the past 24 months, we have seen dealers get into difficult circumstances. And where no private capital alternative exists and the market area is a substantial service location, we have been compelled to step in and acquire some dealerships.

But it is our desire and our objective – and one of our business goals is to divest of those as quickly as practical to private-capital operators.

* * *

[0114] Q. And what was the reason for that?

A. That one is somewhat mysterious. She left somewhat quickly, and there really was no – I can't – I don't know why.

Q. Okay. That's fair enough. When did she leave?

A. I would estimate two years ago.

Q. Okay. Who took her place?

A. I believe Brian Higgins was the immediate – or at least the direct successor to her. I have to think of this in terms of head count. We have open positions. And I believe

Brian Higgins was the individual who was hired to replace that vacancy.

Q. Let me have you take a look at Exhibit 101. Can you identify that?

A. Yeah.

Q. What is that?

A. This is a synopsis of a general understanding of vision of what we anticipated it was going to take in order to produce a more profitable business for both the dealers and for Volvo.

Q. Do you know who issued that?

A. Well, it originally – no. That's destination. No, I don't know from whence that came. I've never seen it laid out in this form. It says, "Due to the 2000 glitch," and it has Barbara Rosetti's name [0115] in the receipt line.

Q. Now, is that an accurate statement of the Volvo vision as of that date?

A. Yeah. That's what we saw we had to accomplish in order to secure higher levels of profitability for the dealership and for the manufacturer, given what our analysis of the situation was.

Q. And one of the elements was to reduce the number of dealerships?

A. Yeah. That's an outcome, not an objective. We saw that the businesses needed to be larger in order to amortize the overheads. The costs that the dealers incur to represent product lines are rising.

The margins available on trucks and parts have compressed for both manufacturers and dealers, and as a consequence a certain scale is necessary to achieve the kind of profitability levels that we're citing in there as our objective for the dealerships.

Q. And has Volvo actually made progress in achieving that goal or made progress in areas which have resulted in fewer dealers?

A. The number of dealerships has reduced, although I wouldn't – I would say that the number of dealerships – that has more been a result of [0116] economic duress brought on by market conditions than it has by – proportionately, more of that has happened in spite of our influence than has as a result of the actions we've taken.

Q. What was the truck market like generally in 1999?

A. It was inflated beyond reason, and we're now paying the piper. I liken it to that last drink one has at a party that the hangover – the longer you prolong that last drink, the deeper the hangover is. And were now in a heavy hangover.

Q. Okay. When did the decline begin?

A. The order intake, which is the first indication, began to drop precipitously in the latter part of – pardon me – in the middle part of 1988. The production rates remained far, far in excess of what the order support would suggest was reasonable through – till essentially the third quarter of last year.

And the outcomes of that were a dramatic reduction in the industry's backlog and a huge run-up in retail inventories.

Q. Did you say 1988 in your answer?

A. '98. I'm sorry –

Q. 1998?

A. – if I didn't enunciate clearly.

* * *

In the United States District Court
Western District of Arkansas
Fort Smith Division

Docket No. 00-CV-2031 (RTD)

[Caption Omitted In Printing]

DEPOSITION OF
ROBERT DAVID WRIGHT

At Greensboro, North Carolina
Thursday, May 24, 2001
8:50 a.m.

Reported by: Ramona J. Crouse

[Read into the record at trial on January 17, 2002]

* * *

[0069] Q. Okay. How is dealer stock priced? How is the dealer price of its own inventory determined?

A. There's a net discount that's received – if it's a stock truck, there's a net discount that's received. And then they can apply for more concession, again, based on the competitive environment of the deal.

Q. Well, if a truck is sold to a dealer for its own stock or own inventory, is there usually a customer waiting in the wings for that stock truck? Is that your understanding?

A. If it's for stock, no. They're speculating that there would be a customer out there.

Q. Okay. And does Volvo require dealers to maintain a certain level of stock for inventory?

A. Sure. A representative sample of the product line.

Q. Okay. And does that vary, depending on the dealership, as to the number of trucks required?

A. It depends on the size of the market.

* * *

[0073] Q. All right. Does a dealer generally pay more for his own inventory than the price he quotes to customers for – let's say if a dealer's required to have five trucks on hand.

A. Uh-huh.

Q. Does a dealer pay more for those stock trucks than what the dealer may be able to obtain for a five-truck deal to a customer?

A. Yes, because we discount the trucks to the retail market to the customer.

Q. So –

A. The difference is in a wholesale mentality versus a retail mentality. And we are – our total focus right now is on retail velocity, moving the trucks [0074] through.

So if a dealer says, "I've got" – you know, "I've got a deal with this customer," then that's when we apply the discount. We try to give them some help up front to reduce their floor-plan charges, but the ultimate discount is based on what the dealer – what the customer requires to make the deal.

Q. And do you know whether it is the practice of Volvo that when a dealer sells a truck out of inventory – is that dealer required to replenish that stock truck?

A. Not always.

Q. Okay. Under what circumstances would the dealer not be required to restock a truck which is sold out of inventory?

A. If he's overstocked, if the market is not conducive to having the same level of inventory that they had before. I mean, that's something that we watch every single day, is the dealer inventory levels.

To be honest with you, we – we only want them to keep a minimal amount. Retail velocity is the key, and that was – that's been the fallacy in this industry for years, is people operated on a wholesale mentality. And that's why you get [0075] inventory clogged up and dealers go out of business all over the industry.

The trick is to move the stuff through, and that's what we're focused on, not stocking – not stocking a big number of trucks but finding customers and retailing them.

Q. Well, given that philosophy, does it seem reasonable to you that if a dealer has stock on hand, that that dealer ought to be able to receive additional concession level in an effort to sell stock trucks?

A. Depends on the customer and the competitive environment.

Q. Okay. Well, to your knowledge, is there any prohibition against a dealer obtaining additional concession level with regards to trucks held in the dealer's inventory?

A. Quite the opposite. We've spent tens of millions of dollars moving dealer inventory over the past 18 months, and we want them to move it. Soon as they move it, we can build a new one.

Q. Okay. So you're saying that, yes, additional RSA is available to a dealer with regard to his stock trucks?

A. Correct.

[0076] Q. All right. And is that – are the concession levels consistent with the sale of just – I mean, is it treated in the same manner as trucks which are not in the dealer inventory? In other words, you go through the same concession process?

A. Yes. Right.

Q. Is there any difference that you know of?

A. Same – same decisions are made.

Q. All right. There's another paragraph here in this . . .

* * *

[0078] Q. You don't have any expectation of what the dealer ought to be able to earn in the sale of a truck to a customer?

A. Depends on the customer. Depends on the trade. Some dealers lose money on trucks. Some dealers make $10,000 on one truck. It's all over the board.

I mean, right now you've got dealers – Freightliner dealers that are losing $10,000 per truck. There were times when we were selling 770s when dealers were making ten or 12 thousand dollars gross profit per truck. So it's all over the board.

MR. WILLIAMS: Could we take a break? Maybe we can check on that call too, follow up.

MR. BYARS: Sure. Fine.

(Short break from 11:14 am. to 11:28 am.)

Q. Okay. In one of your answers – I believe I asked you about how the dealer stock is handled with the dealer obtaining additional retail sales assistance with units of stock.

A. Uh-huh.

Q. And I believe you stated that the decisions are made the same way –

A. Uh-huh.

[0079] Q. – as a sale to a customer. Right?

A. Uh-huh.

Q. But is the process the same?

A. As to how he gets that discount for stock?

Q. Yes.

A. No. Its different.

Q. Okay. How does that –

A. There's established guidelines. It's just discounted up front for a stock truck.

Q. Okay. So there's a discount up front for a stock truck?

A. Right.

Q. But is there – is there any other discount available after that?

A. Yes.

Q. Okay. And what is the process with regard to obtaining additional retail sales assistance?

A. Same as any other truck, whether it's ordered or the other. They – I think were still faxing that information in. They fill out a form. They fax it – they fill out a form, tell us what they need, fax it in, and we respond back.

Q. Why is that done differently from the electronic?

A. We just haven't put that on the electronic system yet. It's a couple of months out.

[0080] Q. Okay. How many dealers are currently within the Volvo dealer network?

A. Hundred and sixty-something, I think.

Q. Do you know how many dealers were in the dealer network one year ago or one and a half years ago?

A. Probably about the same.

Q. Okay. Have some dealers which have gone out of business – have they been replaced by other dealers?

A. Yes.

Q. How has that occurred?

A. Can you clarify that?

Q. Has Volvo provided assistance in the acquisition of dealerships or consolidation of dealerships?

A. Financial assistance through – yeah, we've provided some financial assistance.

Q. Okay. To how many different dealers?

A. I don't know.

Q. Okay. Has Volvo also increased its number of what I guess you'd call company store –

A. Yes.

Q. – company-owned franchise?

A. Yes.

Q. And how many does Volvo currently have?

A. I think we have seven or eight.

* * *

In the United States District Court
Western District of Arkansas
Fort Smith Division

Docket No. 00-CV-2031 (RTD)

[Caption Omitted In Printing]

DEPOSITION OF
SUZANNE KEITH WARREN

At Greensboro, North Carolina
Tuesday, May 22, 2001
8:32 a.m.

Reported by: Ramona J. Crouse

[Read into the record at trial on January 18, 2002]

* * *

[95] Q. Does Volvo have any methodology for determining whether dealers are bidding on the same customer?

A. The current system in place today, the electronic quote system, will flag and identify any incoming quote if there is a similar match in the system.

Q. What do you mean by "a similar match in the system"?

A. Meaning that the – as the – as a submitted customer name – if it matches up to a four-letter series, then the individual looking at the quote has an option – they – there's a – it's flagged by a indicator that they can

click on, which will then shown them anything that matches a four-letter criteria.

Q. Okay. And how long has that been in place?

A. We – the electronic quote system hasn't been in – was rolled out in – in 2000. It was rolled out not to all regions at the same time, and I don't recollect which ones were turned on prior to others. I mean, I don't – I don't remember the [96] time frame when the different regions were turned on to that.

Prior to that, we could do a name search in the mainframe to look for any similar matches.

Q. Well, was there a policy to do that in every – every – every time an RSA request was submitted?

A. It was the responsibility of the district sales manager. If he was knowingly on a quote for a customer outside his district, then he's responsible for contacting his counterpart to discuss the transaction to ensure that everybody was equalized.

Q. How long was that in place?

A. I can speak to how long I've been in the department, and it's been in place since then.

* * *

[102] Q. On a day-to-day basis, in your approvals of these concession amounts which exceed the published level, how frequently do you obtain a price given by a competitor?

A. Just taking a guess here, probably less than ten or 15 percent of the time.

* * *

[131] Q. Okay. What was the market like generally in '97?

A. If memory serves me, '97 we started in the up trend, is when the market took off for heavy [132] trucks.

Q. Okay. And for how long did that up trend continue?

A. Till the first quarter of last year.

Q. Okay. First quarter of 2000?

A. Uh-huh.

Q. All right. Has it been a dramatic decline since the first quarter of 2000?

A. Yes, sir.

Q. Okay.

* * *

Q. Are you aware of any circumstances where an RSA may be adjusted after the fact?

A. I mean, it would –

Q. For example, if a dealer had a situation where he may be losing money on used trucks or the trade, that Volvo would come in and make an adjustment to the RSA.

A. We get requests for additional concession, and it's – we use the exact same process as we would for an original concession. So that would be –

Q. Okay. And then are new invoices generated to reflect those adjustments?

* * *

In the United States District Court
Western District of Arkansas
Fort Smith Division

Docket No. 00-CV-2031 (RTD)

[Caption Omitted In Printing]

[Plaintiff's Exhibits 1, 16, 54, 100, 101, 137, 199, 268, 272 and Defendant's Exhibits 268, 269, 270 are reproduced on the following pages.]

PLAINTIFF'S EXHIBIT 1

* * *

The Company and the Dealer agree:

I. SELLING PRIVILEGE

1.01 Appointment

(a) General. The Company appoints the Dealer as an independent authorized retail dealer for the resale of new Trucks and Parts and Components (together the "Products"), and to provide parts, used truck service, and technical support to customers of Products. The Company may from time to time change its offering of Products without prior notice to the Dealer. The Dealer accepts this appointment subject to the terms of this Agreement, which includes the Company's Portfolio of Criteria, and agrees to conduct its operations in accordance with these terms. This is an exclusive appointment, which means the Company will not give any other dealer rights to locate a facility in the Dealer's Area of Responsibility (as defined in Section 1.02) so long as the Dealer is in compliance with its obligations under this Agreement.

(b) Controlling Individual. The Company enters into this Agreement in reliance on the qualifications of the Controlling Individual(s) identified in the Dealer Statement of Ownership Addendum. The Company and Dealer agree the Controlling Individual and the percentage stated in the Dealer Statement of Ownership Addendum will remain the same, unless a change is made in accordance with Article VIII, Section 8.02.

1.02 Area Of Responsibility

The Area of Responsibility is that territory which is the dealer's area of primary sales, service and customer

support responsibilities. The boundaries of the Area of Responsibility shall be set forth in the Area of Responsibility Addendum provided by the Company. The Company has determined that the Products can be marketed best and serviced most effectively and customers supported best by the dealer in this geographic region. Dealer recognizes that factors which led to this determination may change and that there may be good reason to change the Area of Responsibility in the future. In order to most effectively serve customers and potential customers for the Products, the Company reserves the sole right and discretion to redefine from time to time suitable boundaries for the Dealer's Area of Responsibility and for any other dealer's area of responsibility. If the Company decides to change boundaries because the Dealer is not providing adequate coverage to all or any part of the Area of Responsibility, the Company will not introduce such changes until after giving the Dealer notice and six (6) months to correct the deficiency. In all other cases the Company shall give the Dealer sixty (60) days advance notice of any change in boundaries.

1.03 Portfolio of Criteria

The Dealer shall at all times perform in accordance with and remain in compliance with the terms of the Portfolio of Criteria. The Portfolio of Criteria will be used as a benchmark for business planning, and its terms are subject to review on an annual basis, in connection with the preparation of the Business Plan, or other interval as determined appropriate by the Company.

1.04 Addenda and Attachments

All addenda and other attachments to this Agreement are an integral part hereof. To the extent that such addenda or attachments may require execution by Dealer or Company,

this Agreement shall be of no force or effect until the addenda or attachments have been duly executed.

II. DEALERSHIP OPERATIONS

It is the Dealer's primary responsibility to effectively develop the business of selling and servicing the Products and to support the customers of Products in accordance with Total Customer Focus in the Area of Responsibility. The Company relies upon the Dealer to deal directly with and develop a strong customer base in this territory, and to conduct all of its business activities in a manner which will reflect favorably upon and preserve the goodwill and reputation of the Dealer, the Company and all other Company dealers. All aspects of the dealership business, including, among others, Truck sales, Parts sales, repair service, used truck sales, full service leasing, finance and insurance, and administration, must be given adequate care and attention. Success of the Company, the Dealer and the other Company dealers depends upon establishing a reputation for customer satisfaction in all aspects of the dealership operations.

2.01 Trucks

(a) Truck Sales. The Dealer shall vigorously and aggressively promote in the Area of Responsibility the sale, lease and use of the full range of models of Trucks with specifications appropriate for the customer's intended use. The Dealer shall regularly and systematically solicit all owners and users of Trucks and prospective owners and users of Trucks in the Area of responsibility. In those instances where a customer or a potential customer has expressed a desire to purchase a truck for an application for which the Company has a suitable offering, the Dealer

shall vigorously pursue the marketing of such Truck and in all cases submit to the customer a Truckmatch quotation or other written offer to sell or lease the Truck, and a written statement of the Company's applicable new Product warranties. Since the Dealer is most closely familiar with local conditions and the customer's particular needs, preparation of the Truck's specifications shall be the responsibility of the Dealer. Upon request, the Company will assist the Dealer in pursuing the sale of any Truck. If for any reason the Dealer believes it may be unable to vigorously pursue any transaction, it shall immediately notify the appropriate Company representative, setting forth the name of the customer and a description of the type of vehicle in which the customer is interested, and any special terms and conditions known to the Dealer.

(b) Truck Inventories. The Company shall provide the Dealer with Truck inventory guidelines for unsold Trucks designed to assist the Dealer in developing the sales potential of the Area of Responsibility. The Dealer will carry a representative inventory of unsold Trucks, sufficient to meet or exceed these guidelines.

* * *

2.13 Annual Business Plans And Sales Objectives

On an annual basis or other period specified by the Company, the Dealer shall submit to the Company on forms provided by the Company a Business Plan projecting operating results for the upcoming year or years covering new Truck sales, Parts sales, service sales and used truck sales. The Dealer shall incorporate into its plans the specific sales objectives provided by the Company, which shall be based on some or all of the following factors,

among others: the Dealer's prior sales, the Dealer's present market position, the Company's national, Operating Company and District market positions, the long range plans and objectives of the Company, an analysis of the local market and projected movement in the local market. Such plans shall contain in detail, among other things, analyses of the Dealer's present market position, its short and long term sales objectives and strategies, tactics and programs which the Dealer will implement to achieve its objectives. The Company shall provide the Dealer with such assistance in formulating its sales and marketing plans as is reasonably necessary. The Dealer shall use its best efforts to meet the objectives set forth in the Business Plan.

* * *

V. TERMINATION

5.01 Term of Agreement

This Agreement shall be for a term specified in the Term Addendum, subject to an annual performance review. Unless otherwise stated in the Term Addendum, the term of this Agreement shall be for five years. Each year, the Company shall conduct an annual performance review of the Dealer. If the Dealer has met its obligations under this Agreement, including the Portfolio of Criteria, an additional one year shall be added to the term, so that the term shall be continuously five years. If the Dealer has failed to meet its obligations under this Agreement or the Portfolio of Criteria, the Company may, at its option (i) refuse to modify the term stated in the Term Addendum, so that the term decreases by one year for each year of

such failure or (ii) replace the Term Addendum with a Probationary Status Addendum of a shorter term.

It is the objective of both the Dealer and the Company to have this Agreement continue in effect indefinitely while the Dealer continues to satisfy its obligations and meet its objectives, evidenced by ongoing term extensions. The general provisions of this Agreement may be modified by the Company, as business conditions and other circumstances change over time.

Provisions of Section 5.01 are subject to the provisions in Section 5.04; and neither the Dealer nor the Company waive any of their respective rights under Section 5.04.

5.02 Termination by Mutual Consent

The Dealer and the Company may, by mutual consent, terminate this Agreement at any time.

5.03 Termination by Dealer

The Dealer may terminate this Agreement at any time, at a date specified in a written notice given to the Company at least sixty (60) days prior to the termination date, during which period the Dealer will be expected to continue to perform all of its obligations under this Agreement.

5.04 Termination by the Company for Cause

(a) General. The Company may terminate this Agreement on reasonable advance notice upon the occurrence of any of the following:

(i) Failure of the Dealer to pay any sum due to the Company within thirty (30) days following receipt of notice of nonpayment from the Company.

(ii) Failure of the Dealer to pay any sum due to any financing source or to any other third party within thirty (30) days after demand for payment if such nonpayment does or may result in the Company incurring liability to a third party.

(iii) Loss of an adequate wholesale credit line without implementing a satisfactory substitute within thirty (30) days.

(iv) A change in or resignation or removal of a Controlling Individual except as expressly authorized in this Agreement.

(v) Any attempted or actual sale, assignment or transfer of this Agreement or of any of the Dealer's rights or duties under this Agreement except as expressly authorized in this Agreement.

(vi) The conviction of the Dealer or any Controlling Individual of any felony or any crime which involves moral turpitude or which may adversely affect the business or reputation of the Dealer, the Company or the Products.

(vii) A misrepresentation by the Dealer of a material fact in connection with any application for appointment as a dealer for the Company, or any financial statement or other document submitted by the Dealer under this Agreement, or any claim for compensation or credit for warranty, recall or similar services, or any other claim for payment submitted by the Dealer to the Company.

(viii) Failure by the Dealer to comply with all laws or regulations applicable to the sale or service of Products, including all federal, state and municipal licensing and permit requirements, which failure adversely affects the

Dealer's ability to do business as contemplated by this Agreement.

(ix) Any dispute among Controlling Individuals which, in the opinion of the Company, is likely to adversely affect the business reputation of the dealer, the Company or the Products.

(x) The filing by the Dealer of any petition for relief as a debtor under the Bankruptcy Code or any state insolvency law, any assignment by the Dealer for the benefit of its creditors, or the appointment of any trustee, receiver or similar fiduciary for the Dealer or for all or a substantial part of the Dealer's assets.

(xi) An adjudication or determination by any government agency that the Dealer or a Controlling Individual has committed a deceptive or unfair business practice which, in the opinion of the Company, is likely to adversely affect the business reputation of the Dealer, the Company or the Products.

(xii) An actual or attempted sale by Dealer of any of its principal operating assets which adversely affects the Dealer's ability to do business as contemplated by this Agreement.

(xiii) Failure of the Dealer to conduct regular sales, service and parts operations during customary business hours for five (5) or more consecutive days, unless caused by force majeure, without the prior written consent of the Company.

(xiv) The unauthorized use by the Dealer of the Company's Trademarks.

(xv) A violation by the Dealer of any material provision or requirement of the Portfolio of Criteria except as provided in Section 5.01.

(xvi) Failure of the Dealer to perform any material obligation under this Agreement.

(xvii) A significant act or omission of the Dealer which is damaging to the Company or the network of dealers.

(xviii) Refusal by the Dealer to timely furnish sales, service or financial information and related supporting data, or to permit the Company to examine or audit the Dealer's accounts and records as provided in this Agreement.

(xix) Failure of the Dealer to pay any tax obligation to any governmental authority resulting in any adverse action by that agency against the Dealer, which materially affects the Dealer's performance under this Agreement.

(b) Non-Performance. It is understood and agreed by the parties that the duties and obligations imposed upon the Dealer by this Agreement are intended to be a precondition to the continuation of the relationship between the Dealer and the Company. Dealer's performance under any prior form of Dealer Sales and Service Agreement with the Company may be considered in evaluating Dealer's performance under this Agreement. In the event the Dealer fails to perform any material duty or obligation imposed upon it by this Agreement, the Company may (i) terminate this Agreement upon reasonable notice; or (ii) exercise its rights under Article V, Section 5.01. In the event the Company determines that the Dealer is failing to meet its performance obligations the Company will

notify the Dealer in writing of such failure or failures, will upon request promptly review with the Dealer any aspect of such failure or failures, and will provide Dealer with a reasonable period, to remedy all failures. If the Dealer fails or refuses to remedy all failures within this time period, the Company may terminate this Agreement.

5.05 Rights and Obligations on Termination

Upon termination of this Agreement for any reason, the following will occur:

(i) The Dealer's right to represent the Company and buy, sell or service Products will immediately terminate, except to the extent the Company elects to fill unfilled orders pursuant to Section 5.05(ii). Notwithstanding the foregoing, the Dealer shall have the right to sell or otherwise dispose of Products in its possession at the time of termination which are not purchased by the Company pursuant to Section 5.05(iv).

(ii) The Company will have the option to either cancel or fill any unfilled orders placed by the Dealer for Products. The Company may require that Products delivered subsequent to the earlier of the effective date of termination or the date of notice of termination be paid for on a cash-on-delivery or other basis.

(iii) Sums owed by the Dealer to the Company will be due and payable not later than the effective date of termination, notwithstanding any other prior agreement or course of dealing.

(iv) The Company shall purchase from the Dealer, subject to inspection, any new, unused, and salable trucks in the Dealer's inventory which were purchased from the Company, provided that such trucks (i) were purchased

from the Company not more than one year prior to being tendered for repurchase, (ii) have not been materially altered or modified while in the Dealer's possession, and (iii) do not have specifications which are so unique or unusual so as to render them unsalable in the Company's reasonable judgment. The Company shall also repurchase from Dealer any new, unused and salable Parts in the Dealer's inventory which were purchased from the Company. Such repurchase of Products by the Company shall be in accordance with Company policies as announced from time to time. Amounts payable to the Dealer by virtue of this subsection shall first be credited against the Dealer's liability, if any, to the Company. No payment shall be made to the Dealer for repurchased Products until there has been a full accounting of the Dealer's liability to the Company, including all contingent liabilities. The Dealer shall, as a condition to any repurchase hereunder, fully cooperate with the Company in complying with all applicable bulk transfer laws, and, without limiting the generality of the foregoing, shall execute such documents as are necessary for compliance therewith. The Company shall have no obligation to repurchase any Product from the Dealer unless the Dealer is able to deliver good title thereto, free and clear of all liens and encumbrances, and unless the Dealer has fully complied with Sections 3.04 and 5.05(v).

(v) As a condition precedent to the Company's obligation to make any payments under this Section 5.05, the Dealer will remove from public view all business signs which bear a Company Trademark, service mark or trade name. If such signs belong to the Dealer, the Company will have an option to purchase them at the amount, net of depreciation, at which they are carried on the Dealer's books.

(vi) The Company shall use its best efforts to settle all accounts payable to or by Dealer within sixty (60) days of the date of termination.

5.06 Succession Rights

(a) Designated Successor. Each Controlling Individual may propose a successor to his or her interest by delivering to the Company a completed Application for Designated Successor on the appropriate form supplied by the Company. To qualify the proposed successor must be a full time employee of the dealership and otherwise meet the criteria generally applied by the Company to dealer applicants. The Company will promptly review the Application for Designated Successor and respond to the Controlling Individual with its decision or a request for additional information. If the Application is approved, the person named in the application will become a Designated Successor and the Company will execute the appropriate Successor Addendum to this Agreement. Unless a material change occurs following the execution of the Successor Addendum, upon the death or incapacity of the Controlling Individual the Designated Successor will, with his or her consent, be appointed to replace the deceased or incapacitated Controlling Individual.

(b) Absence of a Successor Addendum. In the event of death or incapacity of a Controlling Individual when there is no executed Successor Addendum or qualified Designated Successor, the Company may terminate this Agreement subject to the following. The remaining Controlling Individuals, if any, and the deceased or incapacitated Controlling Individual's heirs or assignees shall have up to six months following the death or incapacity to

qualify a replacement Controlling Individual in accordance with the rights and procedures set forth in Article VII.

* * *

PLAINTIFF'S EXHIBIT 16

VOLVO
Volvo GM Heavy Truck

7900 National Service Road
P.O. Box 26115
Greensboro, NC 27402-6115
Telephone 910 393-2000

April 28, 1997

Mr. David Reeder
Reeder-Simco Truck Center
3421 South Zero
Fort Smith, AR 72903

Dear David,

Each year, Volvo GM Heavy Truck Corporation performs a review of its dealers. During the review we consider factors that we judge key to determining how successfully our dealers are maintaining their commitments to their contracts and agreements with Volvo GM Heavy Truck (e.g., Dealer Sales and Service Agreement, Annual Marketing and Business Plan, VE D Addendum, VN Commitment and Agreement, etc.).

The criteria considered this year included the following:

Truck Retails Achieved vs. Business Plan Objective
Parts Purchases Achieved vs. Business Plan Objective
VE D Engines Retailed vs. Business Plan Objective
Owned Net Working Capital Maintained vs. Business Plan Standard
FACTS Statement Submission
VN Criteria Compliance

Attached you will find a summary of our review of your 1996 performance. The results of this review necessitates our issuing a one year Probationary Status Addendum to your Dealer Sales and Service Agreement beginning

March 31, 1997. In addition, a Deficiency Cure Schedule has been included which defines acceptable levels of performance which must be met in order to receive a standard term addendum for your Dealer Sales and Service Agreement. Failure to meet these levels of performance by March 31, 1998 may force us to seek remedies available to us under the terms and conditions of the Dealer Sales and Service Agreement.

Volvo GM Heavy Truck Corporation will assist your organization in achieving compliance with your contractual commitments. Appropriate members of your district team will be in contact with you shortly to assist you in developing a plan to rectify the noted shortfalls as you move forward in 1997.

If you have any questions regarding the attached or the process of earning a longer term addendum, please feel free to contact Barbara Rossetti at (910) 393-2966.

Sincerely,

/s/ Chris Patterson
Chris Patterson
Executive Vice President
Sales and Marketing

Enclosure

PROBATIONARY

TERM ADDENDUM
TO
VOLVO GM HEAVY TRUCK CORPORATION
Dealer Sales and Service Agreement

In accordance with Article V, Section 5.01 of the Agreement, the term of this agreement between **Volvo GM Heavy Truck Corporation** (the "Company") and,

DEALER:	**REEDER-SIMCO TRUCK CENTER**
ADDRESS:	**3421 SOUTH ZERO**
CITY, STATE, ZIP:	**FORT SMITH AR 72903**
EFFECTIVE DATE:	**MARCH 31, 1997**
EXPIRATION DATE:	**MARCH 31, 1998**

Volvo GM Heavy Truck Corporation

By: /s/ S. Boris
Director, Distribution and
Dealer Development

PLAINTIFF'S EXHIBIT 54

VOLVO

Volvo Trucks North America, Inc.

Chris W. Patterson
Executive Vice President
Sales and Marketing

December 1, 1999

By Certified Mail, Return Receipt Requested

Mr. David Reeder
Reeder-Simco Truck Center
3421 South Zero
Fort Smith, AR 72903

Dear Mr. Reeder:

This letter is to inform you that Volvo Trucks North America, Inc. has reviewed your performance through the first nine months of 1999, and it appears that you will not meet the mutually acceptable goals established for your AOR and Dealership by year end. Your current year-to-date performance follows your having been placed on Probationary Status for 1998 due to unacceptable performance levels.

Should your full year 1999 performance continue at this unacceptable level, Volvo Trucks North America, Inc. hereby gives notice it will terminate your Dealer Sales and Service Agreement, effective March 31, 2000. This letter serves as official notice of cancellation of the aforementioned Agreement. The reasons for this action are as follows:

1) Non-performance in the area of truck sales – Truck Retails Achieved vs. Business Plan Objective

2) Non-performance in the area of Volvo engine sales – VED Engines Retailed vs. Business Plan Objective

3) Non-performance in the area of parts purchases – Parts Purchases Achieved vs Business Plan Objective

4) Other issues that have been previously discussed

Should you have any questions, please contact David Winner at (336) 393-2966.

Sincerely,

/s/ Chris Patterson
Chris Patterson

Cc: Ms. Patricia Stroud, Director
Arkansas Motor Vehicle Commission
101 East Capital
Suite 210
Little Rock, AR 72201

PLAINTIFF'S EXHIBIT 100

[Hersher, David]
Memo Message panel 98-04-04 09:52:27
Command =>
Destination . . . => VTNA.DLRDEV
COMMUNICATION TO DEALERS Received from
Memo title . . =>. MAR ISSUE
Page 1(10) Line 1 Col 1(70)

– – – Received from VTNA.DLRDEV 910 393-2306
98-03-31 14:08

VOLVO TRUCKS NORTH AMERICA, INC
"GUSTAFSON LETTER"
March 1996

RELEASE
03/31/98

MARCO MEETING SETS PATH

The North American Dealer Conference held in Marco Island, Florida March 1-4 was a huge success. Day-one activities outlined the course for the future for Volvo Trucks and the transportation industry.

Marc keynoted the meeting by stating that Volvo intends to achieve the best distribution network in the business. Speaking to customer demands for increased service among fierce competition, Marc indicated that 50% of Volvo Truck dealers would not be in business in the next few years. His comments reinforced Volvo's position that dealers, large and small, who take care of the customer, support Volvo products, and make the investments in their business, will be profitable as Volvo dealers for many years to come.

Day two of the meeting offered specifics about the programs that will make Volvo and its distribution network unique among its peers. Volvo Actions Service (VAS), a one-of-a-kind call service already a success in Europe, was introduced to North America. Logistic Parts Agreement (LPA), a virtual parts inventory exchange was also rolled out as a way to increase turns while supporting your customers with a higher fill rate. The MVP program – a 21 day delivery concept to eliminate flooring cost was also introduced. These were just three examples of the revolutionary programs that Volvo is introducing. You will be notified when a summary of the meeting material is available.

SUPER BOWL CAMPAIGN SUPER

Results from the Super Bowl Commercial and Promotion exceeded target in all respects. USA Today rated the Volvo Trucks North America commercial #1 among automotive and #1 among business-to-business advertisers.

Our own research shows that we had a very positive effect within our target audience and the public at large.

Best Drive in the Game entries also exceeded target. A direct mail campaign was launched in March targeting those prospects. The campaign features a free calling card with a test drive and a $1000 refund after the first payment on a 770 financed by VTFNA.

NC TRUCKER BEATS THE ODDS!

Since Super Bowl Sunday, ten finalists have been dreaming of hearing their name announced during Volvo Trucks' "Best Drive in the Game" sweepstakes grand-prize presentation at the Mid-America Trucking Show. But, only one finalist, Donald Norman, East Bend, N.C., left the show as the owner of a new Volvo 770 highway tractor, valued at $120,000.

"I've been driving trucks for 42 years and the Volvo 770 is my first new truck – and it's the best one on the road," said Norman.

For Norman, winning the Volvo 770 marks the second time this year he's beaten the odds. Norman was seriously injured six months ago and has just returned to his job as an owner/operator and proprietor at East Bend Equipment, Inc., East Bend, N.C. Now, Norman is looking forward to growing his business with his new Volvo truck.

The on-stage award ceremony took place in front of 18,000 trucking professionals during the Volvo-sponsored Brooks & Dunn concert at the Mid-America Trucking Show in Louisville, Ky., March 21. Mid-America is the trucking industry's largest trade show. Norman and nine other finalists in the "Best Drive in the Game" sweepstakes received an all-expenses-paid trip for two to participate in the award ceremony.

In addition to the new truck, Chevron Lubricants will pay for the cost of all lubricants Norman purchases at a Volvo dealership in the first five years of ownership. Chevron is the primary lubricant supplier to Volvo Trucks.

VOLVO ENGINE SUPPORT MATERIAL ON THE WAY

Volvo is beginning to ship special tools, diagnostic tools and service literature to your dealership. Parts for the new Volvo engine began shipping in late February and early March.

CNN COVERS VOLVO TRUCKS' USE OF GENETIC ALGORITHMS

In several reports aired by CNN International. CNN WorldView and CNN Science and Technology Week, the network profiled Volvo Trucks' use of production

scheduling software at NRV that is based on genetic algorithms. Volvo Trucks is the first OEM in the automotive industry to use this technology.

Briefly, the technology optimizes line sequencing based on more than 80 constraints in order to ensure assembly workers have the necessary time to properly build our products. The software has taken a process that once consumed days and now allows the plant to develop schedules overnight.

NEW REGIONAL VICE PRESIDENT NAMED

Jack Conaghan will be joining Volvo Trucks North America as Regional Vice President – Midwest. He will report to Steve Larkin. Jack will be heading up the newly formed Midwest Region. He will be based in Chicago, working from his home until our new regional office opens in the Spring. Jack has extensive experience in the heavy truck industry. He started his career 25 years ago with Navistar International Transportation Corporation, and over the years, has held various management positions with Navistar. Most recently, he was Manager of Navistar's Chicago Used Truck Center.

VOLVO SPONSORS HIGHWAY ANGELS PROGRAM

Volvo Trucks North America is proud to announce its sponsorship of the Highway Angel Program. For the next three years, Volvo Trucks will be the exclusive sponsor of this grass-roots effort, which was developed by the Truckload Carriers Association (TCA) to publicly recognize truckers for helping motorists.

This effort is a perfect fit with our strategy to establish Volvo as the company committed to improving truckers' lifestyles. We are also proud to sponsor this program because we believe it is critical to our

customers' success to elevate the image of the professional trucker in their own eyes and the eyes of the public.

In brief, the Highway Angel Program allows anyone to nominate a trucker who has helped another motorist. For example, the trucker may have changed a flat tire or rescued an accident victim. After the incident is verified by TCA, the trucker receives a patch, lapel pin and certificate recognizing his or her assistance. TCA will also send a letter to the company the trucker works for and to the person who made the nomination.

Like TCA, Volvo Trucks is committed to recognizing those truckers who go out of their way to help. The Highway Angel Program does that in a meaningful way.

VOLVO DEALER INTRANET

Now that the Volvo Dealer Intranet is rolling out to all dealers it is very important that you begin replacing any "dumb" terminals and older model PCs with new hardware. Volvo has provided you with a list of PC hardware specifications to help you make your purchasing decision. For the latest recommendations please call 336-393-2425. You will need a PC running Windows 95 to be able to access any Volvo intranet software. The new Parts system due out in September 1998 will only work with a new PC. After that date your "dumb" terminals will be obsolete.

---- 98-03-31 14:08 --- Sent to ----------
– VTNAD PRINCPAL US DEALER PRINCIPALS

PLAINTIFF'S EXHIBIT 101

Memo Message panel 98-01-02 4:33:25
Command =>
Destination . . . => VTNA.VGH360BR
BARBARA ROSSETTI (EXT 296 Received from
Memo title . . .=> DEC 97 UPDATE
Page 13(15) Line 193 Col 1(66)

Due to the 2000 glitch

The Volvo Vision was discussed:

Volvo challenge	Volvo Vision
* too many dealers	* fewer dealers, larger markets
* under performing dealers	* Professionally managed
dealerships* low profitability (under 4% net goal)	* Consistent profitability 4%
* Fleet trucks	* Premium Market
* Minimum dealers in Used Trucks.	* Need dealers in the Used Truck business
* Average Market size 1100	* 2500 Market size
* Owners now 146	* vision 75
* Full line dealers 169	* vision 175

PLAINTIFF'S EXHIBIT 199

ID	Model	TruckNo	LineNo	Text
386178	VNL64TDAY	248419	00001	
386179	VNL64TDAY	248419	00002	NEW RIVER PLANT PAGE 1
386180	VNL64TDAY	248419	00003	ROUTE 643
386181	VNL64TDAY	248419	00004	DUBLIN, VA 24084
386182	VNL64TDAY	248419	00005	DEALER..: 5758D VEHICLE I.D. NBR: 4V4ND2JF9 YN248419
386183	VNL64TDAY	248419	00006	GVWR: 50000
386184	VNL64TDAY	248419	00007	DEALER INVOICE NUMBER..: 99/33958
386185	VNL64TDAY	248419	00008	ORDER NO: HILAND-99 IN-VOICE DATE. . . . : 10/07/1999
386186	VNL64TDAY	248419	00009	CUSTOMER:
386187	VNL64TDAY	248419	000010	SOLD TO.: SOUTHWEST MISSOURI TRK CTR,INC HILAND DAIRY INC
386188	VNL64TDAY	248419	000011	2527 N. EAST-GATE 1133 EAST KEARNEY
386189	VNL64TDAY	248419	000012	SPRINGFIELD MO 65803 SPRINGFIELD MO 65803

386190	VNL64TDAY	248419	000013	
386191	VNL64TDAY	248419	000014	
386192	VNL64TDAY	248419	000015	DISPATCH DATE . . . : 10/07/1999
386193	VNL64TDAY	248419	000016	SHIP TO.: 2527 N. EASTGATE OPERATING CO. . . . : SOUTH-WEST
386194	VNL64TDAY	248419	000017	SPRINGFIELD MO 65803 POST-MARK DATE . . . : 08/21/1999
386195	VNL64TDAY	248419	000018	————
386196	VNL64TDAY	248419	000019	MAJOR COMPO-NENT DESCRIP-TION DEALER LIST DEALER NET
386197	VNL64TDAY	248419	000020	MODEL: 2000 VNL64TDAY CHASSIS $ 71,996 $ 57,597
386198	VNL64TDAY	248419	000021	OPTIONS $ 11,603 $ 9,282
386199	VNL64TDAY	248419	000022	ENGINE: CUM 14L370HP&1800 RPM, 1450LBFT@1200 RPM
386200	VNL64TDAY	248419	000023	SERIAL NUMBER: S11977436
386201	VNL64TDAY	248419	000024	TRANSMISSION: FULLER RTX-14709H, 9 SPEED

386202	VNL64TDAY	248419	000025	SERIAL NUMBER: K0037536
386203	VNL64TDAY	248419	000026	FRONT AXLE: 12,000 LB FRONT AXLE
386204	VNL64TDAY	248419	000027	SERIAL NUMBER: AVF99202085
386205	VNL64TDAY	248419	000028	REAR AXLE: MERITOR RT40-145 40,000 LB
386206	VNL64TDAY	248419	000029	SERIAL NUMBER: AVA99293041 AVA99293190
386207	VNL64TDAY	248419	000030	SUSPENSION: 38,000 LB REAR AXLE LOAD (17 TONNES)
386208	VNL64TDAY	248419	000031	———— ————
386209	VNL64TDAY	248419	000032	TOTAL: $ 83,599 $ 66,879
386210	VNL64TDAY	248419	000033	FREIGHT: $ 900
386211	VNL64TDAY	248419	000034	CONCESSION AMOUNT: QUOTE # I701101 8.5% CHASSIS $ 4,896-
386212	VNL64TDAY	248419	000035	CONCESSION AMOUNT: QUOTE # I701101 8.5% OPTIONS $ 789-
386213	VNL64TDAY	248419	000036	PRICE ADJUST-MENT: $ 796

386214	VNL64TDAY	248419	000037	FLOORING: 15 DAYS FLOORING STD $ 0
386215	VNL64TDAY	248419	000038	GMAC
386216	VNL64TDAY	248419	000039	7400 W. 110TH ST.
386217	VNL64TDAY	248419	000040	SUITE 400
386218	VNL64TDAY	248419	000041	OVERLAND PARK KS 66210
386219	VNL64TDAY	248419	000042	MSO LOCATION: DEALER
386220	VNL64TDAY	248419	000043	———
386221	VNL64TDAY	248419	000044	TOTAL DEALER COST DUE: $ 62,890
386222	VNL64TDAY	248419	000045	NOTE: CLAIMS FOR CREDIT MUST BE RE-CEIVED BY TRUCK PRICING
386223	VNL64TDAY	248419	000046	WITHIN 60 DAYS TO RECEIVE CONSIDERATION.
386224	VNL64TDAY	248419	000047	NEW RIVER PLANT PAGE 2
386225	VNL64TDAY	248419	000048	INVOICE NBR: 99/33958
386226	VNL64TDAY	248419	000049	SERIAL NBR: 248419 MODEL: VNL64TDAY DEALER: 5758D
386227	VNL64TDAY	248419	000050	OPTION SPECI-FICATIONS LIST
386228	VNL64TDAY	248419	000051	CODE PRICE

386229	VNL64TDAY	248419	000052	BASE MODEL
386230	VNL64TDAY	248419	000053	004-653 VNL64T 0
386231	VNL64TDAY	248419	000054	007-006 VNL64T DAY 71,996
386232	VNL64TDAY	248419	000055	2C-D1 STD NON SLEEPER CAB 0
386233	VNL64TDAY	248419	000056	ENGINE AND EQUIPMENT
386234	VNL64TDAY	248419	000057	101-OC7 CUM-MINS N14 370HP 1800RPM 1450 LB-FT 3,815
386235	VNL64TDAY	248419	000058	HA-XR CUM 14L 370HP&1800RPM, 1450LBFT@1200 RPM STD
386236	VNL64TDAY	248419	000059	102-370 370 HORSEPOWER STD
386237	VNL64TDAY	248419	000060	KU-11 80 DBA USA EXTERNAL NOISE REQUIRE-MENT STD
386238	VNL64TDAY	248419	000061	974-X98 NO EXTE-RIOR NOISE TEST REQUIRED STD
386239	VNL64TDAY	248419	000062	JA-BA 111 DEG F, 44 DEG C COOL-ING CAPACITY STD
386240	VNL64TDAY	248419	000063	HL-10 SILICONE RADIATOR & HEATER HOSES 67

386241	VNL64TDAY	248419	000064	208-012 KYSOR ON/OFF FAN CLUTCH 0
386242	VNL64TDAY	248419	000065	K0-D1 TURNED OUT EXHAUST STACK EXTEN-SION 17
386243	VNL64TDAY	248419	000066	KN-B1 STAINLESS STEEL EXHAUST SHIELD 19
386244	VNL64TDAY	248419	000067	VW-BP BENDIX 16.5 CFM TUFLO 750 COMPRESSOR 466
386245	VNL64TDAY	248419	000068	5N-A1 PHILLIPS 120V 1500W LH RECPT BLOCK HTR 79
386246	VNL64TDAY	248419	000069	HT-F2 C-BRAKE BY JACOBS, 3 POSITION SWITCH 1,796
386247	VNL64TDAY	248419	000070	HR-D1 SIDE MOUNTED ENGINE OIL CHECK & FILL 54
386248	VNL64TDAY	248419	000071	TRANSMISSION
386249	VNL64TDAY	248419	000072	RW-7V FULLER RTX-14709H, 9 SPEED 282
386250	VNL64TDAY	248419	000073	7R-B1 SYNTHETIC TRANSMISSION LUBRICANT 53

386251	VNL64TDAY	248419	000074	RB-A1 EXTENDED LUBE LINE 7
386252	VNL64TDAY	248419	000075	FRONT AXLE
386253	VNL64TDAY	248419	000076	370-122 MERITOR FF966 12,000 LB CAP 0
386254	VNL64TDAY	248419	000077	FX-D1 12,000 LB FRONT AXLE STD
386255	VNL64TDAY	248419	000078	XA-BP SHEPPARD M100P POWER STEERING GEAR 0
386256	VNL64TDAY	248419	000079	7V-B1 SYNTHETIC FRONT AXLE LUBRICANT 3
386257	VNL64TDAY	248419	000080	REAR AXLE
386258	VNL64TDAY	248419	000081	330-440 MERITOR RT40-145 40,000 LB 0
386259	VNL64TDAY	248419	000082	R2-K1 MERITOR RT40-145 40,000 LB STD
386260	VNL64TDAY	248419	000083	760-380 38,000 # GAWR STD
386261	VNL64TDAY	248419	000084	TA-F8 3.90 REAR AXLE RATIO 0
386262	VNL64TDAY	248419	000085	TU-A1 FULL LOCKING WHEEL DIFFER-ENTIAL 638
386263	VNL64TDAY	248419	000086	7W-B1 SYN-THETIC REAR AXLE LUBRI-CANT 109

386264	VNL64TDAY	248419	000087	350-286 38,000 LB VOLVO AIR SUSP 52" SPACING 823
386265	VNL64TDAY	248419	000088	F1-HA 38,000 LB REAR AXLE LOAD (17 TONNES) STD
386266	VNL64TDAY	248419	000089	NEW RIVER PLANT PAGE 3
386267	VNL64TDAY	248419	000090	INVOICE NBR: 99/33958
386268	VNL64TDAY	248419	000091	SERIAL NBR: 248419 MODEL: VNL64TDAY DEALER: 5758D
386269	VNL64TDAY	248419	000092	OPTION SPECI-FICATIONS LIST
386270	VNL64TDAY	248419	000093	CODE PRICE
386271	VNL64TDAY	248419	000094	CHASSIS
386272	VNL64TDAY	248419	000095	400-176 176" WHEELBASE 186
386273	VNL64TDAY	248419	000096	403-003 .28"X11.81" STRAIGHT STEEL FRAME RAILS 125
386274	VNL64TDAY	248419	000097	YA-B1 .28" (7MM) FRAME SECTION THICKNESS STD
386275	VNL64TDAY	248419	000098	402-056 56" OVERHANG 20
386276	VNL64TDAY	248419	000099	490-231 HOLLAND FW35 AIR SLIDE - LH RELEASE 289

386277	VNL64TDAY	248419	0000100	488-480 48.0" FIFTH WHEEL HEIGHT 0
386278	VNL64TDAY	248419	0000101	487-240 24.0 INCHES OF FIFTH WHEEL TRAVEL 30
386279	VNL64TDAY	248419	0000102	424-023 DUAL 100 GAL 26 DIA UNPTD ALUM 465
386280	VNL64TDAY	248419	0000103	J9-EW 100 GAL RH FUEL TANK STD
386281	VNL64TDAY	248419	0000104	425-002 NO CHASSIS FAIR-ING W/CUSTOM CAB SKIRT 258-
386282	VNL64TDAY	248419	0000105	52-B1 DETACH-ABLE TRAILER CABLE 16
386283	VNL64TDAY	248419	0000106	7K-BA LH BOC ACCESS W/30" ALUM DECK PLATE 189
386284	VNL64TDAY	248419	0000107	68-E1 RUBBER QUARTER FENDER 94
386285	VNL64TDAY	248419	0000108	CAB AND EQUIPMENT
386286	VNL64TDAY	248419	0000109	4R-A1 ROOF FAIRING WITH-OUT LIGHT BOX 726

386287	VNL64TDAY	248419	0000110	H8-A1 VINYL WINTERFRONT AHEAD OF GRILLE 50
386288	VNL64TDAY	248419	0000111	LZ-D1 DUAL TRUMPET AIR HORN MTD UNDER CAB 35
386289	VNL64TDAY	248419	0000112	3G-C1 HEATED, POWER AXIS MIRROR, BOTH SIDES 244
386290	VNL64TDAY	248419	0000113	43-50 DELETE DOWN VIEW MIRROR OVER PASS DOOR 9-
386291	VNL64TDAY	248419	0000114	4N-B1 FBGLS EXT SUNVISOR W/LED MARKER LAMPS 100
386292	VNL64TDAY	248419	0000115	520-013 NATIONAL COMFORT AIR SUSP HB W/ADJ HR 132
386293	VNL64TDAY	248419	0000116	D7-D1 VELOUR SEAT UPHOLSTERY 0
386294	VNL64TDAY	248419	0000117	3P-A1 INBOARD DRIVER SEAT ARMREST 27
386295	VNL64TDAY	248419	0000118	DB-B1 BURLWOOD ACCENT ON DASH 59

386296	VNL64TDAY	248419	0000119	N6-F2 FULL INSTRUMENT 6X4 GAUGE PACKAGE 191
386297	VNL64TDAY	248419	0000120	N5-A1 SINGLE BOC SPOTTING LAMP, FLUSH MTD 34
386298	VNL64TDAY	248419	0000121	NG-B1 TWO RECTANGULAR FOG LAMPS-WHITE 117
386299	VNL64TDAY	248419	0000122	NH-Z1 NO DRIVING LAMPS PROVIDED 0
386300	VNL64TDAY	248419	0000123	LS-F1 HEADLAMPS W/O DAYTIME RUNNING LIGHTS 17-
386301	VNL64TDAY	248419	0000124	PW-A1 DASH MTD HEADLAMP INTERRUPTER SWITCH 47
386302	VNL64TDAY	248419	0000125	NE-D1 DUAL TRUCKLITE SUPER 40 W/SEP BACKUP 60
386303	VNL64TDAY	248419	0000126	5D-05 AM/FM STEREO W/WEATHER BAND 368
386304	VNL64TDAY	248419	0000127	5J-A1 DASH MOUNTED CB RADIO HOLD DOWN 35

386305	VNL64TDAY	248419	0000128	5B-C1 DUAL INTEGRAL MIR-ROR MTD CB ANT W/LEAD 59
386306	VNL64TDAY	248419	0000129	20-001 BASIC UNIQUE KEY (4 KEYS/UNIT) 14
386307	VNL64TDAY	248419	0000130	PAINT
386308	VNL64TDAY	248419	0000131	950-800 SINGLE COLOR PAINT STD
386309	VNL64TDAY	248419	0000132	955-022 VOLVO SUPER LUSTER-SHIELD SOLID 0
386310	VNL64TDAY	248419	0000133	980-008 WHITE S/W 42075 0
386311	VNL64TDAY	248419	0000134	981-998 NO SEC-OND CAB COLOR PROVIDED STD
386312	VNL64TDAY	248419	0000135	NEW RIVER PLANT PAGE 4
386313	VNL64TDAY	248419	0000136	INVOICE NBR: 99/33958
386314	VNL64TDAY	248419	0000137	SERIAL NBR: 248419 MODEL: VNL64TDAY DEALER: 5758D
386315	VNL64TDAY	248419	0000138	OPTION SPECI-FICATIONS LIST
386316	VNL64TDAY	248419	0000139	CODE PRICE
386317	VNL64TDAY	248419	0000140	PAINT
386318	VNL64TDAY	248419	0000141	986-040 BLACK 0

386319	VNL64TDAY	248419	0000142	987-950 BUMPER COLOR SAME AS FIRST CAB COLOR 0
386320	VNL64TDAY	248419	0000143	992-950 CHASSIS FAIRING SAME AS 1ST CAB COLOR 0
386321	VNL64TDAY	248419	0000144	988-401 STEEL-PPTD WHITE, ALUM/PROSTEEL-UNPTD 0
386322	VNL64TDAY	248419	0000145	989-949 SPOKE WHEEL/HUB COLOR SAME AS CHASSIS 0
386323	VNL64TDAY	248419	0000146	TIRES AND WHEELS
386324	VNL64TDAY	248419	0000147	084-001 ACCUR STL PPTD WHT 22.5X8.25 286BC 5HH STD
386325	VNL64TDAY	248419	0000148	0K-A1 STEEL FRONT AXLE HUBS 53-
386326	VNL64TDAY	248419	0000149	093-048 275/80R22.5G MICH-ELIN XZA2 STD
386327	VNL64TDAY	248419	0000150	931-412 MICH-ELIN XZA2 STD
386328	VNL64TDAY	248419	0000151	085-001 ACCUR STL PPTD WHT 22.5X8.25 286BC 5HH STD

386329	VNL64TDAY	248419	0000152	0L-A1 STEEL DRIVE AXLE HUBS 152-
386330	VNL64TDAY	248419	0000153	094-004 275/ 80R22.5G MICH- ELIN PXDHT 152
386331	VNL64TDAY	248419	0000154	934-344 MICH- ELIN PXDHT STD
386332	VNL64TDAY	248419	0000155	ADDITIONAL OPTIONS
386333	VNL64TDAY	248419	0000156	978-015 15 DAYS FLOORING 0
386334	VNL64TDAY	248419	0000157	998-007 ORDER PROCESSED BY GHM 0
386335	VNL64TDAY	248420	00001	

PLAINTIFF'S EXHIBIT 268

REEDER-SIMCO GMC, INC.

RECAP OF FINANCIAL STATEMENTS (SUMMARY OF OPERATING REPORTS)

Year	Total Units Sold	Reeder Gross Profit	Reeder Average GP Per Unit
1990	166	269,140	1,621
1991	38	128,694	3,387
1992	272	563,582	2,072
1993	34	83,205	2,447
1994	65	169,215	2,603
1995	72	181,166	2,516
1996	66	165,499	2,508
1997	85	199,966	2,353
1998	34	102,629	3,019
1999	18	74,207	4,123
2000	8	26,327	3,291

DEFENDANT'S EXHIBIT 268

SPECIAL PRICE CONFIRMATION
Volvo GM Heavy Truck
(FORM MUST BE FILLED OUT COMPLETELY)

EAST FAX # 910-393-2970
WEST FAX # 910-393-4853

DATE 1-15-98 DEALER FAX # 417 869-1900

DEALER NAME Southwest Mo. TrkCtr QUOTE # 3970101

CUSTOMER Hiland Dairy Div/DFA QTR/YR DEL 3

LOCATION Spfld, MO SALESPERSON Lee Ochs

DLR CODE 5758D CUTOMER CODE DIST #

PHONE # 417 809 0566 DIST MGR Truta

QUANTITY 16	QUANTITY
MODEL VNL 64T YR 2000	MODEL YR
SLEEPER TYPE (VN) Day Cab	SLEEPER TYPE (VN)
SERIAL #	SERIAL #
CHASSIS DNET $ 57597	CHASSIS DNET $
OPTIONS DNET $ 9102	OPTIONS DNET $
TOTAL DNET $ 66,699	TOTAL DNET $
GROSS PROFIT $ 1000	GROSS PROFIT $
CONC OFF INV $	CONC OFF INV $
CONC REQ % - $ 7.5%	CONC REQ % - $

(CONCESSION SHOULD BE IN $ FOR STOCK UNITS AND % FOR NEW ORDERS)

CONC APPROVED 7.5	CONC APPROVED

APPROVED BY Des Fuller/M. Truta DATE 1/18/99

COMPETITION FLT SIZE/30 FIN SOURCE Cash

ENGCumm TRANEaton/Fulla R/ARockwell TIRESMichelin

*Hiland is a division of DFA and concessions need to be similar

STOCK TRUCK CONCESSIONS CAN BE CLAIMED ON DCS SYSTEM – UNIT MUST BE WARRANTY REGISTERED BEFORE ANY CLAIMS WILL BE PROCESSED.

[FAXED]

DEFENDANT'S EXHIBIT 270

SPECIAL PRICE CONFIRMATION
Volvo GM Heavy Truck
(FORM MUST BE FILLED OUT COMPLETELY)

EAST FAX # 910-393-2970
WEST FAX # 910-393-4853

DATE 8-19-99 DEALER FAX # 417 869-1900

DEALER NAME Southwest Mo. Truck Ctr QUOTE # I701101

CUSTOMER Hiland Dairy/Div DFA QTR/YR DEL 4th

LOCATION Spfld, MO SALESPERSON Ochs

DLR CODE 5758D CUTOMER CODE ____ DIST # ____

PHONE # 417 869 0566 DIST MGR Truta

QUANTITY 12	QUANTITY
MODEL VNL69T YR 2000	MODEL YR
SLEEPER TYPE (VN) Non	SLEEPER TYPE (VN)
SERIAL # –	SERIAL #
CHASSIS DNET $57597	CHASSIS DNET $
OPTIONS DNET $9282	OPTIONS DNET $
price around 870	
TOTAL DNET $67749	TOTAL DNET $
GROSS PROFIT $1000	GROSS PROFIT $
CONC OFF INV $	CONC OFF INV $
CONC REQ % - $8.5 Per Truta	CONC REQ % - $

(CONCESSION SHOULD BE IN $ FOR STOCK UNITS AND % FOR NEW ORDERS)

CONC APPROVED 8.5% CONC APPROVED

APPROVED BY Mike DATE 8/20/99

COMPETITION DH FLT SIZE ~~108~~ 130 FIN SOURCE Cash
ENG CummTRAN Eaton/Fuller R/A Rockwell TIRES Michelin
Hiland is a div. of DFA and concessions need to be similar
STOCK TRUCK CONCESSIONS CAN BE CLAIMED ON DCS SYSTEM – UNIT MUST BE WARRANTY REGISTERED BEFORE ANY CLAIMS WILL BE PROCESSED

In the United States District Court
Western District of Arkansas
Fort Smith Division

Docket No. 00-CV-2031 (RTD)

[Caption Omitted In Printing]

JURY INSTRUCTIONS 18, 19, and 22

(I)

INSTRUCTION NO. 18

PRICE DISCRIMINATION – "HARM TO COMPETITION" DEFINED

(ROBINSON-PATMAN ACT, 15 U.S.C. § 13(a))

PLAINTIFF MUST SHOW THERE IS A REASONABLE POSSIBILITY THAT THE ALLEGED PRICE DISCRIMINATION MAY HAVE HARMED COMPETITION. IN ORDER TO ESTABLISH THIS ELEMENT OF ITS CLAIM, PLAINTIFF MUST PROVE A SUBSTANTIAL DIFFERENCE IN PRICE IN SALES BY DEFENDANT TO PLAINTIFF AND OTHER COMPETING VOLVO DEALERS OVER A SIGNIFICANT PERIOD OF TIME. THIS REQUIRES PLAINTIFF TO SHOW THAT IT AND THE OTHER VOLVO DEALER(S) WERE RETAIL DEALERS WITHIN THE SAME GEOGRAPHIC MARKET AND THAT THE EFFECT OF THE PRICE. DIFFERENTIAL WAS TO ALLOW THE OTHER VOLVO DEALER(S) TO DRAW SALES OR PROFITS AWAY FROM PLAINTIFF.

THE INFERENCE OF COMPETITIVE INJURY MAY BE OVERCOME OR REBUTTED IF YOU FIND THAT DEFENDANT SHOWED THAT ANY LOST SALES OR PROFITS WERE NOT CAUSED BY THE PRICE DIFFERENTIAL.

DEFENDANT MAY ALSO OVERCOME THE INFERENCE OF COMPETITIVE INJURY BY SHOWING THAT ITS PRICING METHODS, SUCH AS DISCOUNTS TO NEW CUSTOMERS, ACTUALLY HAD THE EFFECT OF INCREASING COMPETITION RATHER THAN DECREASING IT. IF YOU FIND AND DETERMINE THAT THE OFFERING OF SPECIAL DISCOUNTS TO NEW CUSTOMERS AS AN INDUCEMENT TO PURCHASING DEFENDANT'S TRUCKS TENDED TO PROMOTE, RATHER THAN INHIBIT, COMPETITION, YOU SHOULD FIND THAT THERE WAS NO VIOLATION OF THE ROBINSON-PATMAN ACT.

IF HOWEVER, YOU FIND THAT PLAINTIFF ACTUALLY LOST SOME SALE TO A COMPETING VOLVO DEALER AS A RESULT OF THE ALLEGED PRICE DISCRIMINATION, THEN COMPETITION HAS BEEN HARMED TO THAT EXTENT.

IF YOU FIND THERE IS A REASONABLE POSSIBILITY THAT DEFENDANT'S ALLEGED DISCRIMINATORY PRICING MAY HAVE HARMED COMPETITION, THEN YOU MUST FIND THAT PLAINTIFF HAS ESTABLISHED THIS ELEMENT OF ITS CLAIM.

3A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS §§150.205, 207 (5th ed. 2001) (Modified).

INSTRUCTION NO. 19

PRICE DISCRIMINATION-CAUSATION

(ROBINSON-PATMAN ACT, 15 U.S.C. § 13(a))

IF YOU FIND THAT DEFENDANT HAS VIOLATED THE ROBINSON-PATMAN ACT AS ALLEGED BY PLAINTIFF, THEN YOU MUST DECIDE IF PLAINTIFF IS ENTITLED TO RECOVER ANY DAMAGES FROM DEFENDANT.

IN ORDER FOR PLAINTIFF TO ESTABLISH THAT IT IS ENTITLED TO RECOVER DAMAGES, IT MUST PROVE THAT IT WAS INJURED AS A RESULT OF DEFENDANT'S ALLEGED PRICE DISCRIMINATION. THIS IS SOMETIMES REFERRED TO AS PROVING "CAUSATION" OR "FACT OF DAMAGE."

PROVING CAUSATION DOES NOT REQUIRE PLAINTIFF TO PROVE THE DOLLAR VALUE OF ITS INJURY. IT REQUIRES ONLY THAT PLAINTIFF PROVE THAT IT WAS IN FACT INJURED BY DEFENDANT'S ALLEGED PRICE DISCRIMINATION. IT IS IMPORTANT FOR YOU TO UNDERSTAND THAT "INJURY" AND "AMOUNT OF DAMAGE" ARE TWO DIFFERENT CONCEPTS. YOU CANNOT CONSIDER THE AMOUNT OF DAMAGE UNLESS AND UNTIL YOU HAVE CONCLUDED THAT PLAINTIFF HAS ESTABLISHED THAT IT WAS IN FACT INJURED.

TO ESTABLISH INJURY, PLAINTIFF MUST HAVE OFFERED EVIDENCE SHOWING AS A MATTER OF FACT AND WITH A FAIR DEGREE OF CERTAINTY THAT DEFENDANT'S ALLEGED PRICE DISCRIMINATION WAS A MATERIAL CAUSE OF PLAINTIFF'S INJURY. THIS MEANS THAT PLAINTIFF MUST HAVE

PROVED THAT SOME DAMAGE FLOWED TO IT AS A RESULT OF DEFENDANT'S ALLEGED PRICE DISCRIMINATION.

DEFENDANT CLAIMS THAT ANY LOSS OF SALES OR PROFIT BY PLAINTIFF RESULTED FROM THINGS SUCH AS PLAINTIFF'S POOR BUSINESS PRACTICES, PLAINTIFF'S LACK OF EFFORTS TO SELL TO CUSTOMERS OTHER THAN LARGE FLEET CUSTOMERS, THE DISAPPEARANCE OF PLAINTIFF'S KEY CUSTOMER, AND OTHER FACTORS NOT RELATED TO THE ALLEGED PRICE DISCRIMINATION BY DEFENDANT.

PLAINTIFF IS NOT REQUIRED TO PROVE THAT DEFENDANT'S ALLEGED PRICE DISCRIMINATION WAS THE SOLE CAUSE OF ITS INJURY. IN ADDITION, PLAINTIFF IS NOT REQUIRED TO ELIMINATE ALL OTHER POSSIBLE CAUSES OF INJURY TO ESTABLISH CAUSATION. IT IS ENOUGH IF PLAINTIFF HAS PROVED THAT THE ALLEGED PRICE DISCRIMINATION WAS A MATERIAL CAUSE OF ITS INJURY.

IF YOU FIND THAT PLAINTIFF'S INJURY WAS CAUSED BY SOMETHING OTHER THAN THE ALLEGED PRICE DISCRIMINATION BY DEFENDANT, THEN YOU MUST FIND THAT PLAINTIFF HAS FAILED TO PROVE THAT IT IS ENTITLED TO RECOVER DAMAGES FROM DEFENDANT.

3A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTION § 150.230 (5th ed. 2001) (Modified).

INSTRUCTION NO. 22

COMPENSATORY DAMAGES – PRICE DISCRIMINATION

(ROBINSON-PATMAN ACT, 15 U.S.C. § 13(a))

IF YOU SHOULD FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT PLAINTIFF IS ENTITLED TO A VERDICT UNDER THE ROBINSON-PATMAN ACT, THE LAW PROVIDES THAT PLAINTIFF IS TO BE FAIRLY COMPENSATED FOR ALL DAMAGES, IF ANY, TO PLAINTIFF'S BUSINESS OR PROPERTY THAT WERE PROXIMATELY CAUSED BY THE CONDUCT OF THE DEFENDANT.

IN ARRIVING AT THE AMOUNT OF THE AWARD, YOU SHOULD INCLUDE ANY DAMAGES SUFFERED BY PLAINTIFF BECAUSE OF LOST PROFITS; THAT IS TO SAY PROFITS THAT PLAINTIFF WOULD HAVE MADE BUT FOR THE UNLAWFUL CONDUCT OF THE DEFENDANT.

IF YOU SHOULD FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT DAMAGE TO PLAINTIFFS BUSINESS, OR PROPERTY WAS PROXIMATELY CAUSED BY DEFENDANT'S CONDUCT, THEN THE CIRCUMSTANCES THAT THE PRECISE AMOUNT OF PLAINTIFF'S DAMAGES MAY BE DIFFICULT TO ASCERTAIN SHOULD NOT AFFECT PLAINTIFF'S RECOVERY, PARTICULARLY IF THE DEFENDANT'S WRONGDOINGS HAVE CAUSED THE DIFFICULTY IN DETERMINING THE PRECISE AMOUNT.

ON THE OTHER HAND, PLAINTIFF IS NOT TO BE AWARDED PURELY SPECULATIVE DAMAGES. AN ALLOWANCE FOR LOST PROFITS MAY BE INCLUDED IN THE DAMAGES AWARDED ONLY WHEN THERE IS

SOME REASONABLE BASIS IN THE EVIDENCE FOR DETERMINING THAT PLAINTIFF HAS IN FACT SUFFERED A LOSS OF PROFITS, EVEN THOUGH THE AMOUNT OF SUCH LOSS IS DIFFICULT OF ASCERTAINMENT.

IN ARRIVING AT THE AMOUNT OF ANY LOST PROFITS SUSTAINED BY PLAINTIFF, YOU ARE ENTITLED TO CONSIDER ANY PAST EARNINGS OF PLAINTIFF IN THE BUSINESS IN QUESTION, AS WELL AS ANY OTHER EVIDENCE IN THE CASE BEARING UPON THE ISSUE.

IN DETERMINING THE AMOUNT OF ANY LOST PROFITS, YOU MAY CONSIDER WHETHER PLAINTIFF HAS PROVED THAT DEFENDANT'S CONDUCT HAS CAUSED DAMAGE TO THE VALUE OF ITS DEALERSHIP BUSINESS. YOU ARE INSTRUCTED THAT THE EVIDENCE OF LOSS OF BUSINESS VALUE IS ONLY RELEVANT TO THE ISSUE OF LOST PROFITS. THE LOSS OF BUSINESS VALUE CANNOT BE CONSIDERED AS AN ELEMENT OF DAMAGE SEPARATE FROM AND IN ADDITION TO THE LOST PROFITS.

3A KEVIN F. O'MALLEY ET AL., Federal Jury Practice And Instructions §§150.90, 91 (5th ed. 2001) (Modified); 3 DEVITT, BLACKMAR AND WOLFF, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §§ 86.01, .04, .05, .06 (4th ed. 1987) (modified).

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

REEDER-SIMCO GMC, INC. PLAINTIFF

V. Civil No. 00-2031

VOLVO GM HEAVY TRUCK CORPORATION n/k/a VOLVO TRUCKS NORTH AMERICA, INC. DEFENDANTS

MEMORANDUM OPINION

[Filed Mar. 1, 2002]

On this 1st day of March 2002, there comes on for consideration the motion for award of treble damages and attorneys' fees and costs submitted by Plaintiff ("Reeder-Simco"). (Doc. #96.) Plaintiff sued Defendant ("Volvo") for damages for violation of the Arkansas Franchise Practices Act, ARK. CODE ANN, § 4-72-201 *et seq.* (AFPA), and for price discrimination under the Robinson-Patman Act, 15 U.S.C. § 13(a). At the conclusion of a jury trial, Reeder-Simco was awarded damages against Volvo in the amount of $513,750.00 on the AFPA claim and $1,358,000.00 on the price discrimination claim. The parties were directed to submit briefs and affidavits with regard to the issues of treble damages and attorneys' fees and costs. These pleadings have now been filed with the court.

After reviewing the motion and materials provided by Reeder-Simco and its attorney, Joe D. Byars, Jr., and considering the Volvo's response thereto, the Court finds that Reeder-Simco was the prevailing party in this action and, pursuant to ARK. CODE ANN. § 4-72-208(b) and 15 U.S.C. § 15(a), the court may, in its discretion, award a reasonable attorneys' fee. The damage award for the price

discrimination claim should also be trebled pursuant to 15 U.S.C. § 15(a).

I. Treble Damages.

The Clayton Act provides that a prevailing party in a price discrimination suit brought under anti-trust "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). The parties do not disagree that the law requires this court to triple the damage award for the price discrimination claim. Accordingly, the court shall enter judgment for damages on the price discrimination claim in the amount of $4,074,000 (four million, seventy-four thousand dollars).

II. Attorneys' Fees and Costs.

Reeder-Simco is also entitled to recover a reasonable attorney's fee and costs of suit. *Id.* The landmark case in relation to fixing fees is *Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed.2d 40 (1983).[1] In *Hensley,* the Supreme Court set forth a method to be utilized in calculating the amount of the fee award. The court is to first establish the lodestar amount – the number of hours reasonably expended multiplied by the applicable hourly rate for legal services. This is true regardless of the fee arrangement between the attorney and client. *Blanchard v. Bergeron,* 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed.2d 67 (1989); *see also H.J. Inc, v. Flygt Corp.,* 925 F.2d 257, 260

[1] In *Hensley* the Court was construing the provision for attorney fees found in 42 U.S.C. § 1988. However, "[t]he standards set forth in [the Hensley opinion] are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Hensley v. Eckerhart,* 461 U.S. at 433, f.n.7.

(8th Cir. 1991) (holding that proper method for determining fee award under Clayton Act is to first calculate lodestar figure). The plaintiff bears the burden of "establishing an accurate and reliable factual basis for an award of attorneys' fees." *Philipp v. ANR Freight System, Inc.,* 61 F.3d 669, 675 (8th Cir. 1995) (*citing, Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L. Ed.2d 40 (1983)).

Fees should be reasonable regardless of who is footing the bill. In determining the amount of hours reasonably expended, the Supreme Court has indicated counsel are expected to exercise billing judgment and courts should exclude from the initial fee calculation hours that were not reasonably expended:

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's *adversary* pursuant to statutory authority."

Hensley, 461 U.S. at 434 (quoting *Copeland v. Marshall,* 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis in original)). The reasonable rate is determined by reference to the market place. *Missouri v. Jenkins by Agyei,* 491 U.S. 274, 285, 109 S. Ct. 2463, 105 L. Ed.2d 229 (1989).

Once the lodestar amount has been determined, the court must consider whether other factors not considered

in arriving at the lodestar amount suggest upward or downward adjustment to arrive at the appropriate fee award. *Hensley,* 461 U.S. at 434. The court should consider the following twelve factors in arriving at a final determination with regard to the amount of attorney's fees:

> (1) the time and labor required; (2) the novelty and difficulty of questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Winter v. Cerro Gordo County Conservation Bd., 925 F.2d 1069, 1074 n.8 (8th Cir. 1991) (*citing*, *Hensley*, 461 U.S. at 430 n.3). *See also Casey v. City of Cabool, Missouri,* 12 F.3d 799 (8th Cir. 1993) (discussing opportunity cost of the lawyer's time and relevant market); *Morning Pioneer, Inc. v. Bismarck Tribune Company,* 498 F.2d 838, 388 n.15 (8th Cir.1974) (citing appropriate factors for consideration when assessing reasonable attorney's fee in an anti-trust case).

The Supreme Court has indicated that "many of [the twelve] factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable rate." *Hensley*, 461 U.S. at 434, n.9 (citation omitted). The Eighth Circuit is in agreement: "'The lodestar award (the product of reasonable hours multiplied by a reasonable rate) is presumptively a reasonable fee, and most factors

relevant to determining the amount of a fee are subsumed within the lodestar.'" *Casey v. City of Cabool, Missouri,* 12 F.3d 799, 805 (8th Cir. 1993).

Reeder-Simco has filed motion to recover attorneys' fees of $175,070 and $27,417.42 in costs. (Doc. #96.) In support of the motion, Mr. Byars, Reeder-Simco's attorney, has provided an affidavit and itemized billing statement. We note that the fee itemization consists of come 32 pages. It begins with an entry dated December 16, 1999 and ends with a final entry on January 30, 2002. The total hours billed is 1,138.8.

Volvo does not generally object to Mr. Byars' requested hourly rate of $150, but does object to Mr. Byars' use of block billing in the hourly billing records. Volvo claims the block billing makes it difficult to accurately review the statement for hours spent on unrelated or unsuccessful claims. Volvo seeks to exclude from the initial fee calculation hours that were not reasonably expended, and contends that any uncertainties in the number of hours to be excluded should be resolved against Reeder-Simco. We shall address each specific objection in turn.

A. Fees and Costs Related to Kimberly O'Dell.

Ms. O'Dell is a certified public accountant retained by Reeder-Simco to provide a report and expert testimony on the issue of damages. Although Ms. O'Dell prepared three reports on the issue, she was not called to testify at trial. After deposing Ms. O'Dell, Volvo filed a motion seeking to exclude her from testifying as an expert, contending that her methods were unreliable and her conclusions were based upon speculation. The motion was denied as moot after Reeder-Simco withdrew Ms. O'Dell's designation as an expert witness and agreed to exclude her testimony.

Volvo claims that all hours spent conferring with Ms. O'Dell, obtaining information for her use, and expenses relating to her work in the case should be disallowed. Reeder-Simco responds that even though the expert was not called to testify, much of the time spent in consultation with Ms. O'Dell was of some benefit to the attorney in the presentation of damages calculations.

The court finds that Ms. O'Dell was an "expert" of plaintiff's choosing, that a better qualified expert could have been selected at the outset, and that Ms. O'Dell did not provide a report or testimony for use at trial. We find, however, that Ms. O'Dell was of assistance to Reeder-Simco in the preparation of the case for trial in that the proving of damages is one of the most difficult aspects of anti-trust litigation. Therefore, we think it is reasonable to exclude one-third of the fees and expenses billed with regard to Ms. O'Dell. Volvo estimates the total attorney time to be 55.7 hours, and, accordingly, 18.5 hours ($2,775) will be deducted from the initial fee calculation. In addition, the total expenses of $7,400 will be reduced by one-third, and $2,242 will be deducted from the allowed expenses.

B. Hours Billed by Mr. Christian.

Eddie Christian is Mr. Byars' partner, and was present at counsel table during the seven-day trial in this case. Mr. Christian's presentations during the trial were limited to reading several depositions aloud and delivering a portion of Reeder-Simco's closing argument. Mr. Christian is a well experienced trial attorney who often practices in our court. Volvo objects to the 97 hours billed by Mr. Christian as unnecessary and excessive. Reeder-Simco responds that Mr. Christian provided "substantial and valuable consultation, strategic planning and analysis prior to, throughout trial,

and after hours during the course of the trial." (Pl.'s Reply Def.'s Response at 4.) Reeder-Simco also points out that Volvo had two attorneys present at counsel table throughout the trial.

We do not think it unreasonable for a plaintiff to have two qualified and well-prepared attorneys sit at counsel table through a long and complex trial, even if only one has the primary "speaking part." We do not find the time entries to be too vague. The court is well aware of the dates of the trial and how many hours per day the attorneys for both parties spent inside the courthouse. Accordingly, we decline to reduce the fee calculation with regard to Mr. Christian.

C. Data Tech Systems.

Data Tech Systems consulted with Reeder-Simco's attorney on matters relating to the sorting and analysis of computerized data provided by Volvo during discovery. Volvo claims the fees and costs associated with this endeavor were unnecessary and unreasonable. Reeder-Simco contends that the computer consultants were necessary to convert formats and write programs to conduct searches within the mass of data provided.

The court recalls the detailed and lengthy presentation of evidence on sales comparisons between different Volvo dealers which was drawn from computer generated data. We do not find that the use of computer consultants was unnecessary or unreasonable in this case. Therefore, the fees and costs will not be reduced with regard to these items.

D. Claims Dropped or Dismissed Before Trial.

Volvo contends that the total hours claimed should be reduced by five percent, because the billing records do not provide a detailed listing of the hours that were attributed to claims not presented at trial. Mr. Byars stated in his affidavit that the amount claimed did not include services rendered in connection with actions other than the price discrimination claim and the AFPA claim. However, Volvo finds this unacceptable, because Volvo cannot evaluate whether the reductions were reasonable.

We have reviewed the itemized billing statement and do not find that hours spent working on the dropped or dismissed causes of action have been included. Nor do we find the overall fee calculation to be excessive or unreasonable. Accordingly, no adjustment will be made with regard to this objection.

E. Time Attributable to Other Matters.

Over the course of the instant litigation, Reeder-Simco and Volvo were parties to a related administrative matter before the Arkansas Motor Vehicle Commission. In addition, Volvo was the plaintiff in a lawsuit against the commission that was filed in the Eastern District of Arkansas. Volvo contends that time spent by Mr. Byars working on either of the related matters should be excluded from the total fee calculation. Plaintiff contends that no hours for the related matters were included in the fee request.

While the court recognizes the potential for overlapping time, we do not find the total hours requested to be excessive or unreasonable. However, Reeder-Simco did not file a complaint in intervention in this case, so the hours

billed with regard to the "plea in intervention" and the "motion to intervene" should be excluded. Accordingly, the court will deduct two hours of Mr. Byars' time ($300) from the total fee calculation.

F. Reduced Rate For Travel.

Volvo asserts that all travel time should be reimbursed at a reduced hourly rate of $100. Mr. Byars did reduce the hourly rate for some of his travel time, but other times he billed his full rate of $150 per hour. Mr. Byars contends that the full rate was earned, because the travel time was spent preparing for the depositions of the witnesses he was traveling to see.

While we do not dispute that Mr. Byars did work while traveling, it is the plaintiff's burden to establish the factual basis for the award of fees. The itemization entries for April 12, 2001 and November 16, 2001 do not show that the travel time was spent preparing for the depositions. Accordingly, the total fee calculation will be reduced by $525 (10.5. hours x $50/hr).

G. Limited Success on Motions to compel.

Reeder-Simco spent a great deal of time seeking discovery in this matter. Volvo contends that much of the time should be disallowed because Reeder-Simco motions to compel achieved only limited success. Reeder-Simco disagrees.

After reviewing the court records and files, we find that, while Reeder-Simco was unable to obtain all of the information sought, the discovery efforts did procure sufficient evidence to convince the jury to award substantial damages. It also appears that Volvo was not readily forthcoming with the information sought during the

discovery phase. Finally, the case was complex and well defended by the attorneys representing the defendant. Accordingly, we find that the total hours spent with regard to discovery is not unreasonable, and no adjustment shall be made.

H. The Phantom Motion for Sanctions.

Reeder-Simco was billed 2.5 hours for consideration of and research for a motion for sanctions that was never filed. Volvo objects to these items as unreasonable and unnecessary. Mr. Byars responds that the motion for sanctions was seriously considered and would have been based upon statements made by Volvo opposing the motions to compel that were later proven false by witness testimony.

As Reeder-Simco prevailed in the trial, we feel that awarding attorney's fees for consideration of a motion for sanctions would be the same as granting such a motion. Accordingly, the total fee calculation will be reduced by 2.5 hours ($375).

I. Other Factors Not Considered in Lodestar Amount.

Based upon the foregoing analysis, the Court has determined that Reeder-Simco's initial lodestar calculation of $175,070 in fees should be reduced by $3,975 and the costs of $27,417.42 should be reduced by $2,242. Reeder-Simco has not asked the Court to consider any other factors that would merit upward adjustment, and none will be made.

III. Conclusion.

For the reasons stated, plaintiff's motion for treble damages and attorneys' fees and costs is GRANTED.

Accordingly, judgment shall be entered for Reeder-Simco as follows:

1. Damages in the amount of $513,750.00 shall be awarded on the AFPA claim;

2. treble damages in the amount of $4,074,000.00 shall be awarded on the price discrimination claim;

3. attorney's fees and costs shall be awarded in the amounts of $171,095.00 and $25,175.42 each, respectively.

A separate judgment shall be filed concurrently herewith.

IT IS SO ORDERED.

/s/ Robert T. Dawson
Robert T. Dawson
United States District Judge

(9)

MAY 2 6 2005

No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER VOLVO TRUCKS NORTH AMERICA, INC.

DAVID L. WILLIAMS
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ROY T. ENGLERT, JR.*
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**Counsel of Record*

QUESTIONS PRESENTED

The Robinson-Patman Act prohibits specified forms of price discrimination "between different purchasers" where the effect of "such discrimination" may be harm to competition "with any person who * * * knowingly receives the benefit of such discrimination." The questions presented are:

1. Whether there is a violation of the Act – permitting recovery of damages – when a disfavored purchaser does lose sales or profits to a competitor that does *not* purchase from the defendant, but does not lose sales or profits to any purchaser that "knowingly receives the benefit of" the defendant's price discrimination.

2. Whether an unaccepted offer that does not lead to a purchase – so that there is not "discriminat[ion] * * * between different purchasers" as the statutory language contemplates – may be the basis for liability under the Act.

PARTIES TO THE PROCEEDING

The petitioner is Volvo Trucks North America, Inc., defendant-appellant in the courts below. The respondent, plaintiff-appellee in the courts below, is Reeder-Simco GMC, Inc.

RULE 29.6 STATEMENT

Volvo Trucks North America, Inc., is a wholly owned subsidiary of VNA Holdings, Inc., which is a wholly owned subsidiary of AB Volvo, a publicly traded corporation.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Eighth Circuit (Pet. App. 1a-32a) are reported at 374 F.3d 701. The district court's judgment (Pet. App. 33a-34a), memorandum opinion (JA 486-496) and order denying judgment as a matter of law (Pet. App. 35a) are unreported. The district court's order on the jury verdict (Pet. App. 36a-39a) and order granting summary judgment in part (Pet. App. 40a-42a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2004. The order of the court of appeals denying rehearing (Pet. App. 43a-44a) was entered on October 6, 2004. The petition for a writ of certiorari was timely filed on January 4, 2005, and granted on March 7, 2005. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it unlawful

> to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

STATEMENT

The plaintiff in this case, respondent Reeder-Simco GMC, Inc. (Reeder), did not identify a single instance of "discriminat[ion] in price between different purchasers" that injured "competition" with any person that "receive[d] the benefit of

such discrimination." That fact, alone, requires judgment for the defendant-petitioner, Volvo Trucks North America, Inc. (Volvo). The language of the Robinson-Patman Act is unclear about some things, but not about this: A plaintiff must show all the elements of liability – the defendant *sold* (not merely that it offered to sell) a product at two different prices, and that "such discrimination" impaired *competition* with *a favored purchaser* who "receive[d] the benefit of" the discrimination.

A. Volvo's Product Distribution Practices

Volvo manufactures a broad line of heavy trucks, in competition with other manufacturers such as Freightliner, International, Peterbilt, and Kenworth. Heavy trucks are used for hauling freight, for transporting chemicals or petroleum, for mixing and delivering concrete, for construction projects, and for many other purposes. To accommodate these many different uses, Volvo's trucks are built to order to meet an individual customer's needs. Customers can choose among several different base models of trucks, each of which can be built with the specific kind of engine, transmission, brakes, axles, suspension, and other components that will best suit the customer's requirements.

Volvo distributes its trucks throughout the United States through a network of independent dealers, who sell to retail customers. These retail customers typically solicit competitive bids from several dealers representing different manufacturers, and then purchase from the dealer offering the most attractive bid. Most trucks are built to order after the retail customer has contracted to buy from a dealer. Pet. App. 2a. It would be prohibitively expensive for a dealer to maintain an inventory of trucks sufficient to meet the widely diverse needs of its potential retail customers. Therefore, during the competitive bidding process Volvo *offers* to sell trucks to its dealers that will meet the retail customer's specifications, and its dealers offer to sell those trucks to the retail customer. A dealer *purchases* the trucks from Volvo only if the retail customer accepts the dealer's bid.

No evidence was presented in this case of a sale by Volvo to a dealer whose bid to a customer had *not* already been accepted.

Volvo offers a base wholesale price to its dealers that is 80% of its published retail price. Pet. App. 2a. During the competitive bidding process, however, dealers often seek an additional discount, or "concession," from the base wholesale price. Such discounts permit the dealer, if it independently decides to do so, to submit a lower bid to the potential retail customer. *Ibid.* Volvo's district sales managers are authorized but not required to offer such discounts up to amounts specified in a matrix that Volvo does not disclose to its dealers or to the public. JA 325, 335-339. Higher-level personnel from Volvo's headquarters are authorized but not required to offer even larger discounts. See JA 345.

Volvo decides on a case-by-case basis whether to offer a discount and how large such a discount will be, after considering the circumstances of a specific bidding situation. JA 348-349. For example, Volvo may offer a larger discount if its assembly plant is operating well below capacity or if industry-wide demand for trucks is declining. JA 331-332, 334. It may offer a larger discount for a retail customer that has historically purchased a different brand of truck, and may offer an even greater discount if that customer is expected to purchase a large number of trucks in the future. JA 333-334. Because of these and other factors that vary over time and from one retail customer to another, Volvo frequently offers a different discount – and hence a different price – to a dealer in connection with a bid to one retail customer than it offers to that dealer (or to another dealer) in connection with a bid to a different retail customer. JA 342-344. Other truck manufacturers use similar pricing practices. JA 334, 337; see also *Metro Ford Truck Sales, Inc.* v. *Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998) (describing similar pricing practices by Ford), cert. denied, 525 U.S. 1068 (1999).

When two or more Volvo dealers are competing to sell to the same retail customer, Volvo offers the same discount to each. JA 347, 352, 354. Although Volvo's dealer contracts do not prohibit its dealers form selling outside their designated geographic territories, head-to-head competition between Volvo dealers for the same customer is the exception rather than the rule. JA 347-348. Most retail customers solicit a bid from only one Volvo dealer.

B. Reeder's Robinson-Patman Act Claims

Reeder is a truck dealer located in Fort Smith, Arkansas. Pet. App. 2a. In 1995, Reeder entered into a five-year franchise agreement with Volvo, with provisions for automatic one-year extensions if Reeder met certain sales objectives that were to be unilaterally determined by Volvo. Pet. App. 2a. Volvo placed Reeder on "probationary" status when it failed to meet those objectives in 1995 and 1996. JA 26-27, 56-57; see JA 377, 445-446. After Reeder failed to meet the objectives in 1997 and 1998, Volvo notified Reeder that, if it did not meet the 1999 objectives, its franchise would be terminated effective March 31, 2000. Reeder C.A. Br. 4-5; see also JA 377. In February 2000, Reeder sued Volvo, alleging among other things that Volvo had violated the Robinson-Patman Act.[1] Pet. App. 3a.

At trial, Reeder offered anecdotal comparisons of the discounts Volvo offered to Reeder and the discounts Volvo offered to other dealers in selected transactions. Reeder's evidence consisted of three different kinds of comparisons.

[1] Reeder also alleged a violation of the Arkansas Franchise Practices Act, ARK. CODE ANN. §§ 4-72-201 to 4-72-209. Pet. App. 2a. The district court entered a judgment in favor of Reeder on this claim that was affirmed by the court of appeals. Volvo does not challenge that judgment here.

1. The "Sales-To-Sales" Comparisons

The first kind of evidence involved comparisons between the discounts at which Volvo sold to Reeder, in connection with Reeder's sales to four specific retail customers, and the discounts at which Volvo sold to other Volvo dealers, in connection with completely separate transactions involving different retail customers. Pet. App. 4a-6a. For example, Volvo granted a 19% discount to Reeder in connection with Reeder's successful bid in February 1997 to sell two trucks to the city of Fort Smith, Arkansas. Reeder compared that discount to a 21% discount that Volvo granted three months earlier to a Volvo dealer in Kansas City, in connection with its successful bid to sell two trucks to Rapidways, a retail customer located in Kansas City. Pet. App. 5a. Reeder contended that the differing discounts constituted discrimination in price for commodities of like grade and quality, even though the trucks sold to Reeder in the Fort Smith transaction had different engines, transmissions, front and rear axles, and suspensions than the trucks that were sold in the Rapidways transaction, and even though the two transactions were separated by three months. C.A. App. 1582.

Reeder did not contend that any of its sales in these "sales-to-sales" comparisons were unprofitable. Rather, Reeder contended that it would have earned even greater profits on those sales if Volvo had given Reeder the same discount that another Volvo dealer was given in the other transaction. Pet. App. 4a-6a; see also C.A. App. 149-157.

Reeder did not compete against another Volvo dealer for *any* of the retail sales that were examined in the sales-to-sales comparisons. In other words, there was no evidence that Reeder's profits on these sales were constrained because Reeder was bidding against another Volvo dealer that received a greater discount. Reeder faced inter-brand competition from non-Volvo dealers, but there was no intra-brand competition at all in these transactions.

2. The "Offers-To-Sales" Comparisons

Reeder also produced anecdotal evidence showing the discounts that Volvo *offered* to Reeder in connection with twelve of its unsuccessful bids for retail sales, and compared those discounts to the discounts at which Volvo *sold* trucks to other Volvo dealers in connection with their successful bids to different retail customers. Pet. App. 6a. For example, Volvo offered a 23.8% discount to Reeder in connection with Reeder's bid to sell trucks to Beach Trucking. Reeder's bid was unsuccessful, however, so it did not purchase the trucks from Volvo at that price. The 23.8% discount offered to Reeder was compared to a 26.1% discount at which Volvo sold trucks to another dealer in connection its successful bid to a different retail customer. *Ibid.*

Reeder contended that these unsuccessful sales efforts could have succeeded if Volvo had granted a larger discount to Reeder. But there was no evidence that Reeder lost any of these potential sales to another Volvo dealer who had received a larger discount. In all of the offers-to-sales comparisons, as in all of the sales-to-sales comparisons, Reeder was competing only against non-Volvo dealers. Pet. App. 6a.

Moreover, none of the offers-to-sales or sales-to-sales comparisons highlighted by the court of appeals involved Volvo dealers in close geographic proximity to Reeder. Reeder's designated area of responsibility covered 10 counties in western Arkansas and 2 counties in eastern Oklahoma. Reeder's manager, Bill Heck, testified that more than 75% of the trucks Reeder sold from 1995 to 2000 were sold to customers with a presence in this geographic area. C.A. App. 1410.

3. The "Head-To-Head" Comparisons

In the five years in which Reeder claimed discrimination, Reeder submitted bids to sell 5000 trucks (JA 77-79), but Reeder's principal witness testified that it competed against another Volvo dealer only two or three times during that period.

JA 304-305. Reeder produced specific evidence of only two instances of alleged discrimination in which Reeder and another Volvo dealer were involved in such "head-to-head" competition for the same potential sale. Pet. App. 12a. In neither case did Reeder purchase from Volvo.

In one of the head-to-head comparisons, Reeder competed with Southwest Missouri Truck Center to sell twelve trucks to Hiland Dairy. In January 1999 Southwest requested and was offered a 7.5% discount; Reeder subsequently requested a 12% discount but was offered only the 7.5% that Volvo had previously offered to Southwest. Pet. App. 4a. Hiland did not make its purchasing decision until August 1999, however, and in the intervening period Volvo increased its base wholesale price. Hiland decided to purchase from Southwest but demanded the price that had been quoted in January. In response, to compensate for the intervening increase in its base price, Volvo agreed to increase its discount to Southwest to 8.5%. JA 352-353; see also Pet. App. 4a; JA 475-479. Reeder made no effort to show that this level of discount would have been unavailable to it in August 1999, had it still been in negotiations with Hiland Dairy.

In the only other head-to-head comparison Reeder identified – a bid to sell five trucks to Tommy Davidson (Pet. App. 12a) – Volvo offered an 18.9% discount to Reeder and to the other Volvo dealer, but Reeder complained that it was offered the 18.9% discount too late, and lost credibility with the customer as a result. JA 192-194. Tommy Davidson chose not to purchase from either Reeder or the other Volvo dealer, but instead bought Freightliner trucks. JA 194.

In the two head-to-head comparisons, as in all of the offers-to-sales comparisons, Reeder never purchased trucks from Volvo, because Reeder's bids to sell to the retail customer were rejected. And in the Tommy Davidson transaction, as in all of the offers-to-sales transactions, the retail customers who

rejected Reeder's bids chose to purchase from non-Volvo dealers, not from another Volvo dealer.

Reeder also produced evidence that Volvo adopted a business strategy, the "Volvo Vision," that included plans to reduce the number of Volvo dealers and to increase the average size of the regions that its dealers served. Reeder contended that Volvo limited the discounts it offered to Reeder in order to eliminate Reeder as a dealer. Pet. App. 3a.

To prove damages, Reeder relied principally on testimony by its co-owner concerning lost profits and the decline in the company's value over the five-year period of its claim, and on a comparison between its actual sales and the sales objectives that had been established by Volvo for that period. See Pet. App. 20a-22a. Neither measure of damages distinguished between sales and profits lost in competition with other Volvo dealers, and sales and profits lost in competition with non-Volvo dealers. Nor did either one of the damages calculations purport to include harm that was the result of injury to competition, rather than harm in the sense that Reeder did not make as much money as it otherwise would have.

The jury returned a verdict for Reeder on its RPA claim. It found that Reeder suffered actual damages of $1,358,000 because of price discrimination in violation of the RPA, and those damages were automatically trebled to $4,074,000. Pet. App. 33a, 38a. (In the only sale that Reeder lost to another Volvo dealer, the sale to Hiland Dairy, Reeder had contended that it lost $30,000 in gross profits. Pet. App. 4a.) Volvo moved for judgment as a matter of law, which the district court denied. *Id.* at 35a.

C. The Court of Appeals' Decision

A divided panel of the Eighth Circuit affirmed the judgment for Reeder. The majority opinion described the evidence of the offers-to-sales, sales-to-sales, and head-to-head comparisons, as well as the evidence of Volvo's strategy to reduce the number

of dealers through which it would sell its trucks, then turned to the requisite elements of secondary-line RPA violations.[2]

The majority indicated that "as a threshold matter Reeder had to show it was a 'purchaser' within the meaning of the RPA." Pet. App. 8a. The majority also recognized that Reeder was required to show that it competed with favored Volvo dealers, but it did not describe this as a requirement of competition for the same customers. Instead, the majority indicated that "'the favored and disfavored purchasers [must] compete[] at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market.'" Pet. App. 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)). The majority indicated that the RPA required proof of competitive injury, which it described by quoting in part the language of the statute: "The RPA prohibits price discrimination 'where the effect of such discrimination may be substantially to lessen competition * * * or to injure, destroy, or prevent competition.'" Pet. App. 14a (quoting 15 U.S.C. § 13(a)). The majority's quotation omitted the key phrase that follows the quoted language: "with any person who either grants or knowingly receives the benefit of such discrimination." 15 U.S.C. § 13(a).

When it analyzed these essential elements of an RPA claim, however, the majority addressed each in isolation from the others, cobbling together an RPA violation by aggregating elements of wholly distinct transactions. It concluded that Reeder was a "purchaser" because, in the four sales-to-sales compari-

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[2] RPA cases are often described in terms of the relationship between the seller and the party who claims competitive injury. "Primary-line" injury refers to injury to a discriminating seller's competitor; "secondary-line" injury refers to injury to a discriminating seller's customer; and "third-line" injury refers to injury to a customer of the customer of the discriminating seller. 3 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW §§ 20.9-20.12 (1983); 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2300 (1999).

sons, it actually purchased trucks from Volvo. Pet. App. 10a. In those comparisons, though, there was no competition between Reeder and another Volvo dealer. When the majority considered whether Reeder was in actual competition with favored purchasers, it relied on the two head-to-head comparisons (*id.* at 11a-12a), but in those comparisons it was clear that there was no "purchase" by Reeder. The majority also stated that Reeder competed against favored Volvo dealers on the basis of evidence that Reeder and other dealers competed (or could compete) in the same geographic area (*ibid.*), even though there was no evidence (other than the two head-to-head comparisons that failed to result in Reeder purchases) that Reeder and the other dealers competed for the same customers.

The majority held that the evidence was sufficient to show competitive injury, which it described as "lost profits and sales to Reeder and other dealers, and that favored competitors received substantial price reductions over a substantial period of time." Pet. App. 15a. In support of that holding, however, the majority pointed to profits that Reeder lost in the sales-to-sales transactions in which Reeder competed only against non-Volvo dealers. *Id.* at 16a. The majority also relied on the evidence of Volvo's plans to reduce the number of dealers, stating that "the jury properly could infer [that] Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices." *Ibid.* The majority thought that "the elimination of some dealers like Reeder" was "precisely the type of injury the antitrust laws were meant to prevent." *Id.* at 19a.

Judge Hansen dissented, describing the majority's opinion as an "attempt to fit a square peg into a round hole." Pet. App. 27a. He observed that the market for heavy truck sales

> will never produce the kind of competition the RPA was designed to protect because it will never result in the type of two-purchase transaction that itself creates a market for the goods that are sold. Indeed, where, at the time of the end purchase, only one possible seller and one possible buyer exist, competition is totally absent. It is the nature of competitive bidding, not price discrimination, that makes it so.

Id. at 27a-28a. Judge Hansen noted that "'purchaser status' is inextricably intertwined with the existence of actual competition and the potential threat thereto." *Id.* at 28a. In the heavy truck market, "although Reeder and other 'favored' dealers may have competed generally with each other in the larger market for obtaining bids, there is evidence of only two occasions where Reeder competed with a 'favored' Volvo dealer for an actual sale." *Id.* at 29a. The sales-to-sales comparisons were irrelevant "because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." *Ibid.*

Judge Hansen also noted that RPA liability properly can be imposed "only where the factors necessary to state an RPA claim all are present in the same relevant transaction. To the extent that the court looks for the existence of one factor in one transaction and the existence of another factor in a second transaction, I conclude that the proof * * * is too tenuous." Pet. App. 30a. The absence of any evidence that sales or profits were diverted from Reeder to favored dealers was also a critical deficiency in Judge Hansen's view. "Although Volvo's conduct may have injured Reeder's ability to compete with non-Volvo dealers, Reeder must look outside the RPA for any relief for this claimed injury. Contrary to the court's assertion, such an injury is not the type of injury to competition that the RPA was intended to prevent." *Id.* at 29a-30a.

Volvo's petition for rehearing *en banc* was denied. Judges Gruender and Hansen dissented. Pet. App. 43a-44a.

SUMMARY OF ARGUMENT

The RPA is not violated unless the plaintiff shows a diminution in its ability to compete with a person who "receive[d]

the benefit of [price] discrimination." The statute requires a showing of harm to *intra*-, not inter-brand competition. In all of the sales-to-sales and offers-to-sales comparisons, the "favored" Volvo dealer was competing with someone else, not Reeder, to make its sale, and Reeder was competing with the seller of some other brand, not a Volvo dealer, to make its sale.

The one sale Reeder lost to another Volvo dealer, the Hiland Dairy transaction, cannot support a judgment against Volvo because Reeder did not purchase trucks from Volvo in that transaction and because the RPA prohibits only discrimination "between different purchasers." In addition to being plain from the statutory language, the two-purchase requirement has been a recognized bright-line rule in RPA cases and treatises since at least 1939. Any other rule would – as the facts of the Hiland Dairy transaction indicate – lead to meaningless gestures that are of no benefit to anyone and may well harm consumers.

Reeder has never cited any authority that contradicts the principles discussed above. Its strategy, so far, has been to play a game of three-card monte. To show that it was a purchaser, it points to transactions in which it did not compete against another Volvo dealer. To show that it competed against other Volvo dealers, it points to transactions in which it did not purchase from Volvo. To show that there was discrimination, it points to transactions in which it did not compete against other Volvo dealers and transactions in which it did not purchase from Volvo. Treble-damage liability under the RPA requires more than this sleight-of-hand. Reeder must show that illegal price discrimination by Volvo *caused* Reeder antitrust injury, and its mix-and-match approach cannot possibly show causation.

Those issues aside, the Court should take this occasion to recognize that the RPA, by its language, protects *competition*, not competitors. Neither statutory language nor legislative history justifies the decisions of lower courts that have insisted that the RPA be interpreted – in disharmony with other antitrust statutes – to protect competitors even when (as in this case)

there is demonstrably no harm to consumers or the competitive process. This Court in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993), took the occasion to correct lower courts' overreading of the decision in *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), to suggest in primary-line cases that competitors and not competition should be protected. In this case take the Court should similarly take occasion to correct lower courts' overreading of *dicta* in *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 49 & n.18 (1948), to protect competitors and not competition in secondary-line cases. The Court can, however, easily reverse the judgment below – even if it assumes, *arguendo*, that the RPA protects competitors and not just competition in secondary-line cases – by simple adherence to the other statutory language discussed above.

ARGUMENT

"[S]ales of like goods in interstate commerce violate" Section 2(a) "if three conditions are met: (1) the seller discriminates in price between *purchasers*, (2) the effect of such discrimination may be to injure competition *between the victim and beneficiaries of the discrimination* or their customers, and (3) the discrimination is not cost based." *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 577 (1990) (Scalia, J., concurring in the judgment) (emphasis added). Reeder failed to produce evidence of *any* sale that met those criteria. The sales-to-sales comparisons failed to satisfy condition number two because, in those transactions, there was no competition between Reeder and the beneficiaries of the alleged discrimination. The head-to-head comparisons failed to satisfy condition number one because, in those transactions, there was no discrimination between "purchasers." The offers-to-sales comparisons failed to satisfy *both* conditions one and two. Those transactions did not involve discrimination between two purchasers *or* competition between Reeder and a beneficiary of the alleged discrimination.

Reeder's claim fails for an additional reason. The RPA requires proof of injury to "competition." Injury to an individual

competitor, in circumstances that preclude any injury to competition, cannot satisfy that statutory requirement. The Court can reverse the judgment below on the basis of other aspects of the plain statutory language even if it assumes, *arguendo*, that injury to an individual competitor such as Reeder suffices. Nevertheless, this case gives the Court a valuable and rare opportunity to clarify that "competition" in the RPA does not have a different meaning from the use of that term in antitrust law generally, and to make more concrete its admonition in *Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993), that "Congress did not intend to outlaw price differences" – such as those at issue in this case – "that result from or further the forces of competition."

I. The RPA Does Not Protect Competition Between Disfavored Purchasers And Those Who Do Not Purchase The Defendant's Product And Therefore Do Not "Receive The Benefit Of" The Discrimination

The RPA "as a practical matter could not, and does not, ban all price differences." *Brooke Group*, 509 U.S. at 220. Price "discrimination" has been construed very broadly to mean simply a difference in price. *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 558; *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). But the extraordinary breadth of that definition is tempered by the statute's requirement that plaintiffs, to show that price discrimination is illegal, must prove that the price difference had a proscribed effect on competition.

Price discrimination is illegal only if "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a). In a case such as this one, alleging secondary-line price discrimination, the plaintiff must show at a minimum that the discrimination impaired its ability to compete with a favored purchaser,

i.e., a person who "receive[d] the benefit of such discrimination."[3] In this case, Reeder must show that discrimination affected its ability to engage in intra-brand competition against other Volvo dealers who received a more favorable price. If discrimination affected Reeder only in its inter-brand competition against non-Volvo dealers, it does not fall within the prohibition of Section 2(a).[4]

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[3] In the alternative, a plaintiff may prove that the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." This alternative standard is more demanding of plaintiffs because it requires proof not only that competition with favored purchasers has been impaired, but that competition in the market generally may be harmed. See *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 49 (1948) (discussing the distinction between the two kinds of competitive injury). When construing the less-demanding requirement of injury to competition with favored purchasers, courts of appeals have differed over whether harm to an individual competitor, rather than harm to "competition," constitutes a cognizable injury. We address that issue in Section IV of this brief. Sections I-III of this brief demonstrate that the judgment for Reeder should be reversed even if the RPA protects against mere injury to a competitor, because other statutory requirements for liability are not present.

[4] The terms "intra-brand competition" and "inter-brand competition" are sometimes used for convenience in this brief. Those terms accurately describe the relevant RPA distinction (the plaintiff's competition against others who buy the defendant's products, on the one hand, versus the plaintiff's competition against those who do not buy the defendant's products) in this and in most RPA cases. However, there are some cases in which the intra-brand/inter-brand distinction does not coincide with the relevant RPA distinction. First, because the RPA applies to the sales of unbranded as well as branded products, it does not require proof of "intra-*brand*" competition in cases involving unbranded products. Second, the RPA can apply to price differences between two brands sold by a single seller, if the brands are of like grade and quality, so inter-brand competition may be implicated by the RPA when two brands are sold by a single seller. *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 556 n.14 (citing *FTC* v. *Borden Co.*, 383 U.S. 637, 645-646 (1966)). Neither of those situations is present here.

As Professor Hovenkamp explains:

> The theory of secondary-line Robinson-Patman injury is that the unlawful price discrimination injures the disfavored purchaser[] in its ability to compete with the favored purchaser. * * * [T]he mere payment of a higher price than someone else pays for something is insufficient to support the injury requirement. The disfavored purchaser must be injured in its ability to compete with the favored purchaser. For example, suppose that General Motors sells automobiles to a small dealer in Decatur, Michigan, at a higher price than it does to a large dealer in Atlanta, Georgia. But the two dealers each operate in their own geographic areas and never compete for sales to the same customers. We can certainly say that the Decatur dealer has suffered an injury in the sense that it would be better off if it could purchase cars more cheaply, paying the same price that the Atlanta dealer pays. But this is not the injury that the Robinson-Patman Act contemplates. The injury is not merely in the higher purchase price that would injure any purchaser of an input, but in the loss of ability to compete effectively with the favored purchaser. A plethora of decisions have asserted this basic proposition.

14 HOVENKAMP, *supra*, ¶¶ 2333a-2333b, at 88-89.

1. This Court has consistently and repeatedly described the requisite competitive injury in terms of the diversion of sales or profits from disfavored purchasers to favored purchasers. It has never suggested that the RPA reaches price discrimination merely because a disfavored purchaser, if given a better price, could compete more profitably against others who do not purchase the defendant's products. In secondary-line RPA cases, the former effect may be a cognizable competitive injury; the latter effect is not.

FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948), held that the requisite competitive injury in a secondary-line RPA case occurs if a disfavored purchaser is "handicapped in competing

*with the more favored * * * purchasers* by the differential in price." *Id.* at 50 (emphasis added). "[D]ifferent prices for like goods *to competing purchasers* may have the defined effect on competition" if the discrimination "result[s] in price differentials *between competing purchasers* sufficient in amount to influence their resale price." *Id.* at 47 (emphasis added). "[C]ompetition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Id.* at 50.

FTC v. *Sun Oil Co.*, 371 U.S. 505 (1963), also makes clear that the RPA protects competition between favored and disfavored purchasers, but not competition between disfavored purchasers and those who do not purchase the defendant's products. In that case, Sun, a gasoline refiner, sold its gasoline at a discount to McLean, a retail gas station operator, in order to allow McLean to compete more effectively against Super Test, a competing gas station operator that sold another refiner's gasoline. Sun did not provide the same discount to its other station operators, and they lost sales to McLean because of the difference in price. Even though the discount was extended to protect McLean's ability to engage more successfully in inter-brand competition against Super Test, it was held to violate the RPA. "It is the very operators of the other Sun stations which compete with McLean who are the direct objects of protection under the Robinson-Patman Act. The basic purpose of the Act was to insure that such *purchasers from a single supplier*, Sun, would not be injured by that supplier's discriminatory practices." *Id.* at 519 (emphasis added).

Falls City Industries, Inc. v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), likewise focused on intra-brand competition, to the exclusion of inter-brand competition. The defendant sold Falls City beer to a wholesaler in Henderson County, Kentucky, at a lower price than it sold to a wholesaler across the river, in Evansville, Indiana. The lower wholesale price in Kentucky resulted in lower retail prices in Kentucky, and the evidence

showed that many Indiana consumers crossed the river to buy cheaper Falls City beer in Kentucky. This Court observed that "the competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers – in this case the competition between Kentucky retailers and Indiana retailers." *Id.* at 436. But while intra-brand competitive effects were actionable, whether at the secondary-line or tertiary-line level, inter-brand competitive effects were not. Both the district court and the court of appeals found it likely that some or even most of the plaintiff's lost sales were attributable to inter-brand competition, *i.e.*, to "the marketwide decline of Falls City beer." *Id.* at 437. This Court recognized that the plaintiff could not recover for those losses to inter-brand competition, but held that, "if *some* of Vanco's injury was attributable to the price discrimination, Falls City is responsible *to that extent*." *Ibid.* (emphasis added).

In *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), the majority and the dissenters disagreed about the sufficiency of the plaintiff's evidence of competitive injury – the majority remanded the case to the court of appeals for further consideration of that issue, while the dissenters would have affirmed the court of appeals' prior determination that the evidence was insufficient – but there was no disagreement about the kind of injury that was required. "A plaintiff must show, to recover damages for violation of § 2(a) that unlawful discrimination in price allowed a favored competitor to draw sales or profits from him, the unfavored competitor." *Id.* at 569-570 (Powell, J., dissenting).

In all of these cases, the requisite competitive injury was described in terms that coincide with the plain language of the statute. Proof of secondary-line competitive injury requires, at a minimum, proof of harm to competition with a "person who * * * knowingly receives the benefit of" the discrimination. 15 U.S.C. § 13(a).

In this case, the transactions involved in the sales-to-sales and offers-to-sales comparisons cannot support RPA liability for the simple reason that Reeder did not compete in any of these transactions against another Volvo dealer who "receive[d] the benefit of" the alleged discrimination. (The head-to-head comparisons cannot support RPA liability for other reasons that are addressed separately, below.) If sales or profits were diverted from Reeder in those transactions, they were diverted to non-Volvo dealers, not to another Volvo dealer who received a more favorable price. This effect on inter-brand competition is not the kind of competitive injury that the RPA requires. This failure to prove *competition* – an essential element of Reeder's RPA claim – is sufficient in itself to reverse as to all but one of the transactions at issue.

2. Reeder claims – and the Eighth Circuit seemingly agreed – that evidence of substantial price reductions to favored "competitors," over a substantial period of time, is sufficient to support an inference of the requisite competitive effect under *Morton Salt*. See Br. in Opp. 15; Pet. App. 15a-17a. But the decision in *Morton Salt* clearly does not authorize such an inference from the sales-to-sales and offers-to-sales transactions. In *Morton Salt*, five favored purchasers, retail chain stores, had "been able to sell Blue Label salt at retail cheaper than wholesale purchasers from respondent could reasonably sell the same brand of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores." 334 U.S. at 41. The "Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than *their competitors* had to pay." *Id.* at 46-47 (emphasis added). That finding was supported by "testimony from many witnesses * * * that they had suffered actual financial losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices." *Id.* at 50. The Court held that this evidence adequately supported the FTC's finding and,

in *dicta*, suggested that the evidence went further than the Act required, because it was "self-evident * * * that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Ibid.*

Nothing in *Morton Salt* suggests that this observation was meant to broaden the kind of competitive injury that could support RPA liability, by encompassing effects on inter-brand competition. The Court was addressing the kinds of evidence that would support an inference of competitive injury, not the nature of the injury that was required. That is clear from the Court's descriptions of the requisite competitive injury. See, *e.g.*, 334 U.S. at 50 (finding competitive injury because the disfavored "less-than-carload purchasers might have been handicapped in competing with the more favored carload purchasers"). It is also clear from the Court's description of the kind of evidence that would support a factual inference of competitive injury – evidence of sales at substantially different prices to "some customers" and to "the competitors of these customers." *Ibid.*

The sales-to-sales and offers-to-sales transactions cannot properly be regarded as instances in which Volvo sold at a lower price to Reeder's "competitors," so there is no basis for adopting the inference in the first place. See *Falls City*, 460 U.S. at 435 (the *Morton Salt* inference flows from "proof of a substantial price discrimination between competing purchasers over time"). And, even if an initial inference of competitive injury could be drawn merely because Reeder and other Volvo dealers competed as dealers in the same geographic area, that inference is unsustainable in light of the fact that Reeder faced no intra-brand competition in any of the specific transactions involved in the sales-to-sales and offers-to-sales comparisons. *Falls City* makes it clear that any initial inference under *Morton Salt* may be "overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Ibid.*

Nor does *Morton Salt* permit an inference of competitive injury from the head-to-head comparisons. Even if the RPA applied to those transactions (as we explain below, it does not, because those transactions do not involve discrimination between different "purchasers"), "[n]o inference of injury to competition is permitted when the discrimination is not substantial." 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 478-479 (5th ed. 2002) (citing cases). Reeder lost only one sale of twelve trucks to another Volvo dealer, a sale that would have generated $30,000 in gross profits for Reeder. Pet. App. 4a. Discrimination (if there is even that) in only one transaction over a five-year period, involving a bid to sell only twelve trucks (out of Reeder's bids to sell 5000 trucks in the relevant period), could not have a substantial effect on Reeder's business, let alone a substantial effect on competition between Reeder and favored Volvo dealers.

3. Injury to competition with favored purchasers cannot be inferred from Volvo's business strategy to reduce the number of dealers through which it sold trucks. First and foremost, as its language reflects, the RPA deals with "specific sales transactions" (*M.D. Rutledge* v. *Electric Hose & Rubber Co.*, 511 F.2d 668, 677 (9th Cir. 1975)), not general distribution strategies.

Moreover, contrary to the Eighth Circuit's misconception, see Pet. App. 19a, the antitrust laws generally do not interfere with a manufacturer's decision to limit the number of firms that distribute its products. Under the Sherman Act, a manufacturer's outright refusal to deal with a potential distributor is actionable only in the most extraordinary circumstances. See *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). But while the Sherman Act can reach refusals to deal, albeit rarely, the RPA does not reach them at all. See, *e.g.*, FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT § 4.1, at 45-48 (1962) (discussing cases holding that "an outright refusal to sell to one customer cannot constitute a Robinson-Patman violation"); 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOP-

MENTS, *supra*, at 465 n.64 (citing cases). The RPA addresses discrimination, not termination. It places no restraints on a manufacturer's freedom to choose the number, the identity, the location, or the characteristics of distributors to which it will sell or on a manufacturer's freedom to terminate any distributor at will. That is true even though a refusal to deal or the termination of an existing distributor is "different" treatment (and thus "discrimination" in a sense), because Section 2(a) prohibits only discrimination "in price."

Volvo's business strategy does not even suggest a plausible motive for price discrimination, much less provide evidence of the competitive effect that is required. Reeder's claim is predicated on Volvo's ability to offer different prices for different bids. In a market environment in which it could discriminate between bids, Volvo had no logical reason to offer high prices to Reeder in transactions in which Reeder was competing only against non-Volvo dealers. Such behavior would merely divert sales and profits from Volvo to other truck manufacturers. Courts should not infer anticompetitive effects based on the implausible assumption that a business will engage in conduct that will "generate losses * * * with no corresponding gains." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 595 (1986). See Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, in *Symposium: Antitrust at the Millennium*, 68 ANTITRUST L.J. 125, 126 (2000) ("[A] manufacturer cannot profit by weakening its own distribution system or reducing that system's competitiveness.").

4. Careful adherence to the statutory language that limits the scope of the prohibition against price discrimination is especially important. If price discrimination is treated as unlawful merely because a disfavored buyer could compete more profitably in inter-brand competition if it paid a lower price, then virtually all price discrimination will be unlawful. But for the "discrimination" (*i.e.*, if it merely paid a lower price to its supplier), every disfavored buyer could earn a higher profit

margin on each unit it buys and resells or (by passing through the lower prices to its own customers) could resell more units without reducing its profit per unit. This is the "injury" that Professor Hovenkamp describes when he says that a "higher purchase price * * * would injure any purchaser of an input." See p. 16, *supra*.

A decision that such "injuries" are cognizable would radically extend the reach of the RPA. When properly construed to address only competition between favored and disfavored purchasers, the RPA limits a seller's ability to charge different prices in different transactions, but does not completely eliminate that pricing flexibility.[5] That is because, in many markets, price "discrimination" will have no discernible effect on competition between favored and disfavored purchasers. In some markets – including the heavy truck market, in which Reeder competed against another Volvo dealer only two times in a five-year period – inter-brand competition is fierce but intra-brand competition is extremely limited. Properly construed, the RPA permits sellers in such markets to offer selective price reductions that promote inter-brand competition with little risk of RPA liability because competition between "favored" and "disfavored" purchasers is so limited. Moreover, the antitrust laws generally permit sellers to limit the extent of intra-brand competition when such limitations will promote inter-brand competition. For example, manufacturers may grant exclusive distribution rights for defined geographic areas or classes of customers. Antitrust law recognizes that such vertical restrictions on intra-brand competition can enhance inter-brand competition for the benefit of consumers. See, *e.g.*, *Continental T.V., Inc.* v. *GTE*

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[5] As the National Association of State Directors of Pupil Transportation Services – a group of *buyers* of school buses representing consumer interests – observed in its cert.-stage *amicus* brief, such flexibility can have palpable consumer benefits. See Brief of *Amicus Curiae* the National Association of State Directors of Pupil Transportation Services in Support of Petitioner (Feb. 3, 2005).

Sylvania, Inc., 433 U.S. 36 (1977). See generally 14 HOVENKAMP, *supra*, ¶ 2301. When intra-brand competition is limited by such contractual arrangements, a manufacturer can engage in selective discounting to compete against other brands, without affecting (the non-existent) competition between its own distributors. Properly construed, the RPA does not prohibit such discounting, but under Reeder's improper construction the discounting could result in RPA liability to the "disfavored" distributor because of the phantom "injury" it suffers in inter-brand competition.

There is no reason to fear that competition or consumers will be harmed by the price discrimination that is permitted when the RPA is confined to its proper sphere. Precisely the opposite is true. Competition will be harmed by overly expansive application of the RPA. Economists and antitrust scholars have long recognized that competition is generally harmed, and consumers are made worse off, if manufacturers cannot selectively discount their products. See Hovenkamp, *supra*, 68 ANTITRUST L.J. at 127 ("[W]henever anyone takes a longer view than the shortest one possible, incentive discounts further, rather than injure, competition."); 1 ABA SECTION OF ANTITRUST LAW, THE ROBINSON-PATMAN ACT: POLICY AND LAW 29 (Paul H. LaRue, et al., eds. 1980) ("[P]rices may be made more fluid and the general price level in the market lowered if the suppliers can vigorously pursue selected buyers with discounts and if major purchasers can use their countervailing power to force producers to grant price concessions.") (citing U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 63-64 (1976)). Judge Bork has noted that "adjustment to shifting costs and demand is socially desirable, and it is best that appropriate responses be made as quickly and sure-footedly as possible." ROBERT H. BORK, THE ANTITRUST PARADOX 388 (1978). "[R]igid" prices and markets that are "less sensitive to changing demands and costs" are an unhappy result of precluding sellers from "rais[ing] or lower[ing] prices selectively." *Ibid.* See also *id.* at 389-390 (describing pricing flexibility as a protection

against cartel behavior). Professor Hovenkamp's treatise summarizes the "voluminous literature" on the means by which price-discrimination laws, if wrongly construed, can "facilitate price rigidity, including oligopoly and collusion." 14 HOVENKAMP, *supra*, ¶ 2340b1, at 121-123.

This Court has cautioned that interpretations of the RPA that "'extend beyond the prohibitions of the Act * * * help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'" *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (quoting *Automatic Canteen Co. of Am.* v. *FTC*, 346 U.S. 61, 63 (1953)). Just last year, the Court refused to extend the reach of Section 2 of the Sherman Act (a statute whose broad language affords considerable judicial latitude) to require a defendant with monopoly power to comply with specific legal obligations that were imposed by Congress to eliminate the monopoly. See *Verizon* v. *Trinko*, 540 U.S. at 411-416 (refusing to create another exception to the general rule that Section 2 of the Sherman Act imposes no duty to aid competitors). There is even less reason to extend the reach of the RPA here, where an extension would contravene specific language in the statute, where the defendant is a small competitor in an intensely competitive market,[6] and where extension of the statutory prohibition would deter procompetitive behavior that benefits consumers.

II. Robinson-Patman Liability Cannot Arise From A Transaction In Which The Plaintiff Did Not Purchase From The Defendant

Reeder's evidence showed that it lost only one sale to another Volvo dealer – the sale of twelve trucks to Hiland Dairy. The Hiland Dairy transaction cannot support a judgment against Volvo because Reeder did not purchase trucks from

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[6] Volvo has about a 10% market share. See http://www.todaystrucking.com/trucksales-us.cfm.

Volvo in that transaction and because the RPA prohibits only discrimination "between different purchasers."[7]

That conclusion is plain enough from the clear language of the statute, as the lower courts and authoritative antitrust treatises have recognized time after time. In one of the earliest applications of the RPA, *Shaw's, Inc.* v. *Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939), the Third Circuit explained that, for there to be a violation of the RPA, "at least two purchases must have taken place. The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase." *Id.* at 333.

Since *Shaw's,* the two-purchase requirement has been recognized as a bright-line rule that has guided businesses seeking to comply with the RPA and courts addressing the Act's basic scope. In 1962, the leading treatise on the RPA identified "consummated contemporaneous sales transactions" as one of the "basic statutory requirements," "[s]ince no actionable price discrimination can arise until two completed transactions occur." ROWE, *supra*, § 4.1, at 45 (discussing cases applying the two-purchase requirement). Another leading treatise, in

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[7] There are other reasons that this transaction cannot support RPA liability as a matter of law, even if Reeder could circumvent the two-purchase requirement. As we explained previously (p. 21, *supra*), discrimination in one small transaction over a five-year period cannot have a "substantial[]" effect on competition, as the language of Section 2(a) requires, even if the effect on a competitor counts as an effect on "competition." See generally 3 KINTNER & BAUER, *supra*, § 22.6. Moreover, Reeder failed to demonstrate that the discount that Volvo granted to Southwest Missouri Truck Center to close the sale would not have been granted to Reeder if Hiland Dairy had indicated a desire to purchase from Reeder, rather than Southwest. Cf. *Metro Ford Truck Sales, Inc.* v. *Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998) (no discrimination if discounts were functionally available to competing truck dealers), cert. denied, 525 U.S. 1068 (1999).

1983, noted that "there must be at least two actual 'purchases,' in the sense of consummated sales transactions; it is not enough that there be one sale at a low price, and one offer, which was refused (and therefore led to no consummated sale), at a higher price." 3 EARL W. KINTNER & JOSEPH P. BAUER, *supra*, § 21.11 at 192; accord *id.* § 20.5, at 124 ("[T]here must be two actual sales at different prices. If two general contractors request bids from the same subcontractor for identical work and the subcontractor submits an inflated bid to one, but not the other, there is no Robinson-Patman Act problem until and unless a sale has taken place to the disfavored general contractor."). Professor Hovenkamp, in 1999, explained that "[a]n unaccepted or uncompleted offer occurs when the seller is willing to quote a price, howbeit a higher price than the seller is charging other buyers, but the plaintiff fails to purchase the product. Clearly, an unaccepted or uncompleted offer is not a sale; nor is a price quotation that is not followed by a purchase, even if the result of the higher quote is that the plaintiff loses a bid." 14 HOVENKAMP, *supra*, ¶ 2300, at 27 (footnotes omitted).

The two-purchase rule prevents the application of the RPA in competitive bidding situations like the one presented here. In two circuits, the rule has been invoked to reject RPA claims when a seller offered different prices to two firms that were bidding against each other for a sale, but only one of those firms ultimately purchased from the defendant. *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604 (4th Cir. 1985); *M.C. Mfg. Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), cert. denied, 424 U.S. 968 (1976).

But competitive bidding situations constitute only one of many ways in which the two-purchase rule is woven into the fabric of RPA jurisprudence. The rule also precludes RPA liability for discrimination involving leases, licenses, product exchange transactions, and consignment arrangements. See, *e.g.* *Seaboard Supply Co.* v. *Congoleum Corp.*, 770 F.2d 367, 373 (3d Cir. 1985) (consignments); *Export Liquor Sales, Inc.* v. *Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970)

(leases), cert. denied, 400 U.S. 1000 (1971); *LaSalle Street Press, Inc.* v. *McCormick & Henderson*, 293 F. Supp. 1004, 1005 (N.D. Ill. 1968) (patent license agreement), aff'd, 445 F.2d 84 (7th Cir. 1971). It has been applied when sellers have engaged in outright refusals to sell at any price to a prospective buyer because, even if the refusal is discriminatory, a refusal to sell does not lead to a purchase. See *Black Gold, Ltd.* v. *Rockwool Indus., Inc.*, 729 F.2d 676, 682-683 (10th Cir.), cert. denied, 469 U.S. 854 (1984); *Shaw's*, 105 F.2d at 333-334. Courts also have held that there is no "purchase" that can evidence discrimination between two purchasers when goods are transferred between corporations that are both part of a single enterprise (*e.g.*, transfers from a parent corporation to its subsidiary). See 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, *supra*, at 466 n.67 (citing cases).

The application of the two-purchase rule in so many contexts merely highlights the fact that "discrimination" (when construed to mean only a "difference") is pervasive and generally *desirable* in a market economy, because it is an essential mechanism through which more efficient arrangements are encouraged and less efficient arrangements are discouraged. It would be astounding if Congress attempted broadly to require businesses to adopt uniform terms for dealing with all, across the entire spectrum of commercial negotiations and transactions that comprise interstate commerce. Nothing in the text of the RPA suggests that Congress meant to do so.

The circumstances of the Hiland Dairy transaction illustrate why. See p. 7, *supra*. If Volvo had refused to increase the discount to Southwest in order to secure the sale to Hiland, Reeder would have gained no benefit, but Volvo, Southwest, and Hiland would have been harmed – Volvo and Southwest because they probably would have lost a sale to another truck manufacturer and its dealer, and Hiland because it certainly would have lost the benefit of the lower price and probably would have lost the benefit of purchasing the brand of trucks

that it evidently preferred. Volvo could have put off a response to Southwest and Hiland until after it offered a similar discount to Reeder, but there is no good reason to require such delay when it is clear, as it was here, that the retail customer had already decided to buy from Southwest rather than Reeder. At best, the delay would permit an empty formality; at worst, it would risk loss of the sale to another manufacturer. Volvo's pricing reflects an effort to compete more effectively against other manufacturers, not an effort to favor one dealer over another. Volvo sought a goal that is laudable as a matter of antitrust policy, using means that are not prohibited by the terms of the RPA.

III. The RPA Requires Proof Of A Causal Relationship Between The Discrimination Against A Purchaser And The Competitive Injury, Not Merely That Plaintiff Has The "Status" Of A Purchaser Or Of A Competitor To A Favored Purchaser

Reeder has never cited any authority that contradicts the principles discussed above. Its strategy, so far, has relied on sleight-of-hand. To show that it was a purchaser, it points to transactions in which it did not compete against another Volvo dealer. To show that it competed against other Volvo dealers, it points to transactions in which it did not purchase from Volvo. To show that there was discrimination, it points to transactions in which it did not compete against other Volvo dealers and transactions in which it did not purchase from Volvo. Treble-damage liability under the RPA requires more than this shell game.

1. A violation of Section 2(a) can occur only if there is a particular kind of discrimination, a particular kind of competitive effect, and a causal relationship between that discrimination and that competitive effect. That requirement is expressed clearly in the language of the statute, which prohibits only discrimination "between different purchasers," and prohibits that kind of discrimination only if the "effect of such discrimination"

is harm to competition with a person who "receives the benefit of such discrimination." In other words, the discrimination must *cause* the competitive effect. This causal relationship can be shown by direct evidence that price differences resulted in displaced sales or it may be inferred, under *Morton Salt*, from substantial price differences over time. But an inference under Morton Salt cannot survive evidence "breaking the causal connection between a price differential and lost sales or profits." *Falls City*, 460 U.S. at 435. "[T]he requirement of a *causal* connection between the challenged price differential and the claimed substantial competitive impairment" is "of paramount significance." ROWE, *supra*, § 6.8, at 139. "Unless that causal nexus between the price and the detriment appears, the challenged pricing practice is valid as not *legally responsible* for any asserted competitive dislocation." *Ibid.*; see also *id.* § 7.5, at 163-168 (citing and discussing cases).

Because the statute requires a cause-and-effect relationship, a plaintiff's mere status as a purchaser, in transactions in which there can be no competitive injury because there is no competition with a favored purchaser, is insufficient. So, too, is mere status as a competitor in a context in which there has been no discrimination between purchasers. There can be no cause-and-effect relationship – and hence no violation of Section 2(a) – if the discrimination between purchasers occurs only in transactions that are entirely unrelated to the transactions in which there is competition between favored and disfavored purchasers.

2. Recovery of damages requires more than proof of a violation of the RPA. As this Court has held, plaintiffs seeking damages must also prove that they have standing to sue under Section 4 of the Clayton Act. *J. Truett Payne*, 451 U.S. at 561-563. To establish standing, they must prove actual injury, and they must prove "a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969). The injury must be "attributable to something the antitrust laws were designed

to prevent." *J. Truett Payne*, 451 U.S. at 562. It must be an injury "that flows from that which makes the defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), cited in *J. Truett Payne*, 451 U.S. at 562.

To recover damages for RPA violations, the injury must flow from the difference between the prices paid by favored and disfavored purchasers, because that difference in price to two purchasers is a *sine qua non* for the conduct to be illegal. Reeder cannot satisfy this standing requirement. Reeder's success or failure in the transactions encompassed by the offers-to-sales and sales-to-sales comparisons, in which Reeder competed only against non-Volvo dealers, could not have been affected by the prices charged to Volvo dealers in other, unrelated transactions. The profits Reeder earned in the offers-to-sales and sales-to-sales transactions may have been affected by the prices at which Volvo offered or sold trucks to Reeder, and by the prices at which other manufacturers (*e.g.*, Freightliner or Kenworth) offered or sold their trucks to the dealers that were competing against Reeder. But it was the absolute level of Volvo's prices to Reeder (and of other truck manufacturers' prices to their dealers) that mattered, not whether the price to Reeder differed from the price to another Volvo dealer in an unrelated transaction. Reeder's sales and profits in those transactions would have been the same if Volvo's prices to other dealers had been exactly the same as its prices to Reeder or, for that matter, even if prices to other Volvo dealers were *higher* than the prices to Reeder. If Reeder suffered any injury, it did not flow from the *discrimination* in price between Reeder and non-competing Volvo dealers. Reeder's "injury" – the kind of injury that any buyer suffers merely from paying a higher price rather than a lower price – does not confer standing to sue for damages under Section 4 of the Clayton Act.

IV. The Court Can Also Reverse The Judgment Below On The Ground That The RPA Does Not Protect Against Mere Injury To A Competitor, When There Is No Reasonable Possibility Of Injury To "Competition" With Favored Purchasers

Courts of appeals have long been divided on whether the RPA requires proof of injury to "competition" in secondary-line cases, or whether injury to individual *competitors* is sufficient.[8] Even if injury to a competitor is sufficient, Reeder's failure to identify any transaction in which Volvo discriminated between competing purchasers provides ample reason to reverse the decision below, for the reasons explained above. However, this case presents an opportunity for the Court to address the conflict among circuits, and to correct a misreading of the RPA that has unnecessarily placed it at cross purposes with other provisions of the antitrust laws, by reiterating that injury to a competitor, when there is no reasonable possibility that competition will be injured, does not constitute a cognizable injury under the RPA. That principle provides a further reason to reverse the judgment below.[9]

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[8] The D.C. Circuit, in *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988), emphasized the need to avoid unnecessary inconsistencies between the RPA and other antitrust statutes that are construed to promote "pro-competitive efficiency and maximization of consumer welfare." *Id.* at 1138. Therefore, the D.C. Circuit held that injury to *competition* is required. *Id.* at 1143. The Ninth Circuit has explicitly disagreed with *Boise Cascade*, holding that "the inference of competitive injury that arises from proof of injury to a competitor may not be rebutted by evidence that competition was not adversely affected." *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 653, 655 (9th Cir.), cert. denied, 522 U.S. 943 (1997). The Third Circuit has reached the same conclusion. *J.F. Feeser, Inc.* v. *Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991).

[9] Although this issue was not explicitly raised in terms by the Questions Presented in the petition for a writ of certiorari, the petition (at 16 n.3) identified the circuit split and observed that the split "could be resolved through a grant of certiorari in this case." The question is closely enough linked to the issues that *were* raised in explicit terms in the Questions Presented that the Court's precedents would amply justify reaching the issue, if the Court so chose. See *City of Sherrill* v. *Oneida Indian Nation*, No. 03-855, slip op. 14 n.8 (March 29, 2005); *Ballard* v. *Commissioner*, No. 03-184, slip op. 4 n.2 (March 7, 2005); *R.A.V.* v. *City of St. Paul*, , 505 U.S. 377, 381 n.3 (1992). See generally ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.25(f), at 414 (8th ed. 2002) ("Questions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented." (internal quotation marks omitted)). At the same time, as we noted in the petition, the Court can easily reverse without reaching this issue, if that is the path the Court chooses. We respectfully submit that, in the Court's first secondary-line case under the RPA since 1990, it would be beneficial to the bar and the lower courts for the Court to address this issue.

This Court has already held, in *Brooke Group*, that the RPA does not encompass mere injury to competitors. "By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition." 509 U.S. at 220. Whether price discrimination "may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Id.* at 224 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962) (emphasis in original)). Despite this clear statement, some courts have disregarded *Brooke Group*, a case involving primary-line price discrimination and below-cost price discrimination, when deciding secondary-line cases brought by distributors rather than competitors.

There is no basis for that distinction in the opinion in *Brooke Group*; in holding that the RPA, like other antitrust statutes, required injury to competition rather than merely injury to competitors, *Brooke Group* cited (509 U.S. at 220) two secondary-line RPA cases, *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 80 n.13, and *Automatic Canteen*, 346 U.S. at 63, 74.

Moreover, the same misunderstanding of "competition" that currently prevails in some of the lower courts in secondary-line cases also prevailed in some of the lower courts in *primary*-line cases before this Court cleared up the confusion in *Brooke Group*. Specifically, *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), had "often been interpreted to permit liability for primary-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure." *Brooke Group*, 509 U.S. at 221. The Court noted criticism of that decision "on the grounds that such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition." *Ibid.* And the Court acknowledged that *Utah Pie* was but "an early judicial inquiry in this area." *Ibid.* The Court's punch line: "As the law has been explored since *Utah Pie*, it has become evident that primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes under § 2 of the Sherman Act." *Ibid.* So too here, as the law has been explored since *Morton Salt* with its *dicta*, it has become evident that secondary-line competitive injury under the RPA is of the same general character as the injury inflicted by the few vertical practices condemned by the Sherman Act. See 14 HOVENKAMP, *supra*, ¶ 2301. The statutes may differ in degree, see *Brooke Group*, 509 U.S. at 222, but an altogether different kind of injury – pro-consumer, pro-competitive price cuts that harm only a discrete middleman – should not be cognizable under the RPA, even in secondary-line cases.

There is, furthermore, no support in the language of the RPA or in its legislative history for an antitrust-like construction of "competition" in primary-line cases and an anti-consumer, pro-competitor construction of the same word in secondary-line cases. The RPA requires injury to competition in secondary-line cases, just as it does in primary-line cases.

1. The language of the RPA leaves little, if any, doubt that the statute protects competition, rather than the welfare of any individual competitor. Congress easily could have proscribed price discrimination that injures "any person" or, more narrowly, "any competitor of" a "person who * * * knowingly receives the benefit of" the discrimination. Congress chose, instead, to require an injury to "competition."

If there were any ambiguity in that language – and we submit that there is none – such ambiguity is easily resolved by the application of basic principles of statutory interpretation. The word "competition" was used throughout the Clayton Act as originally enacted; when Congress in 1936 amended Section 2 of the Clayton Act by enacting the RPA, it chose to use the word "competition" again. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted). When an amendment to a statute uses a word that is used elsewhere in that statute, the word should be construed to have the same meaning throughout. Under this principle, the word "person" has the same meaning under the RPA that it has under the Clayton Act. *Jefferson Cty. Pharmaceutical Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 156 (1983) ("We do not perceive any reason to construe the word "person" in that Act [the RPA] any differently than we have in the Clayton Act, which it amends."); see also *id.* at 156 n.13 (discussing legislative history of the RPA indicating that terms used in the RPA have the same meaning they have when used elsewhere in the Clayton Act). The word "competition" should also be construed consistently. And, as noted in *Brown Shoe*, in what may be the most frequently quoted axiom in all of antitrust jurisprudence, the word "competition" when used elsewhere in

the antitrust laws means something very different from the word "competitor." 370 U.S. at 320.

This straightforward linguistic analysis carries special force in the context of the RPA, where inconsistent interpretations of the same word produce incoherent antitrust policy. This Court properly construes statutes "to make sense rather than nonsense out of the *corpus juris*." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 101 (1991). It has suggested, time after time, that other provisions of the antitrust laws should be considered when interpreting the RPA because an unwarranted expansion of the RPA's coverage will undermine policies reflected in other provisions of the antitrust laws. See *Brooke Group*, 509 U.S. at 220; *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 568 n.27; *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80; *Automatic Canteen*, 346 U.S. at 63. This desideratum of consistency with the broader policies of the antitrust laws was tied directly to the conclusion, in *Brooke Group*, that "Congress did not intend [for the RPA] to outlaw price differences that result from or further the forces of competition." 509 U.S. at 220.

Some 50 years ago, but after *Morton Salt*, a blue-ribbon committee appointed by the Attorney General of the United States concluded that judicial decisions and the statutory language supported a requirement that

> analysis of the statutory "injury" center on the vigor of competition in the market rather than hardship to individual businessmen. * * * Incidental hardships on individual businessmen in the normal course of commercial events can be checked by a price discrimination statute only at the serious risk of stifling the competitive process itself.

REPORT OF THE U.S. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 164 (Mar. 31, 1955). A highly respected antitrust scholar described the committee's effort as a "good try" that "did not gain judicial acceptance." Thomas E. Kauper, *The Report of the Attorney General's National Committee to Study the Antitrust Laws: a Retrospective*, 100 MICH. L. REV. 1867, 1885 (2002). *This* Court, however, has never rejected the committee's approach. And the lower court cases that reject the approach are, as we will show below, based on a misreading of legislative history, inconsistent with this Court's precedents concerning statutory interpretation in general, and inconsistent with this Court's precedents concerning the RPA in particular.

If properly construed to protect competition, not merely a competitor, the RPA would prevent discrimination in "the case mainly contemplated by the framers of the Robinson-Patman Act; namely, the very powerful buyer or dealer who is able to force a supplier to behave contrary to its independent best interest." 14 HOVENKAMP, *supra*, ¶ 2342c, at 132. A powerful purchaser, by exercising its buying power, may be able to induce discrimination that injures intra-brand *competition* in the market served by the powerful purchaser, an effect that is harmful to rival buyers, to the seller who is induced to discriminate against its own interests, and to the ultimate consumers of the seller's products. See *ibid.* The statute's reference to injury to competition with a favored purchaser who "knowingly" receives the benefit of discrimination supports the view that the statute was meant to address this situation. See *id.* ¶ 2342e, at 141 ("The best explanation of this generally ignored scienter requirement is that Congress's concern in adding the third injury section was with price discriminations induced by large buyers * * *.").

2. Those who have concluded that the RPA protects competitors, rather than competition, usually rely on a selective reading of the RPA's legislative history. That reliance is misplaced. Legislative history cannot override the straightforward language of the statute. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). In any case, the RPA's legislative history does *not* prove that Congress meant to protect against injury to a competitor in circumstances in which competition would not be injured.

The passage of the RPA reflected a congressional judgment that the prohibition against price discrimination in Section 2 of the original Clayton Act did not adequately protect competition. Among other things, Section 2 originally required proof that the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly *in any line of commerce.*" The RPA modified that requirement by permitting proof of injury to "competition with any person who * * * knowingly receives the benefit of such discrimination." Under this modification, it is sufficient to prove harm to intra-brand competition, rather than harm to competition in a "line of commerce" that would encompass both intra-brand and inter-brand competition. The modification, by its terms, does not encompass harm to an individual *competitor* when intra-brand *competition* would not be injured.

Those who claim that Congress intended for the RPA to protect competitors, not competition, usually rely on the House and Senate reports, not the language of the statute, to support their conclusion. See, *e.g.*, *Boise Cascade*, 837 F.2d at 1153 (Mikva, J., dissenting); *Chroma Lighting*, 111 F.3d at 656. Those reports used nearly identical language in describing how the Act would affect existing law. See H.R. REP. NO. 74-2287, pt. 1, at 8 (1936); S. REP. NO. 74-1502, at 4 (1936). As the Senate report explained, the new injury requirement

> accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.

This explanation acknowledges the obvious point that injury to competitors is a prerequisite for injury to competition, but

does not suggest – as some judges of lower courts have believed, and as *dicta* in *Morton Salt*, 346 U.S. at 49 & n.18, may have helped them to believe – that *every* injury to a competitor will *necessarily* produce an injury to competition. Not every seed comes to flower. And, although the Senate report indicates that the amended Clayton Act was meant to "catch the weed in the seed," the report was, after all, explaining a law that addressed anticompetitive effects in their incipiency – a statute that "does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Prods. Ref. Co.* v. *FTC*, 324 U.S. 726, 742 (1945); accord *Brooke Group*, 509 U.S. at 222. The language of the Senate and House reports is perfectly consistent with a natural reading of the language of the statute that makes actionable a new kind of competitive injury: injury to competitors if, but only if, there is a "reasonable possibility" that such injury will lead to harm to intra-brand competition. In other words, "the purpose of the statute was not to reach the injury to a competitor for its own sake, but to use such injury to a competitor to predict that the larger, more general injury to competition would follow." 14 HOVENKAMP, *supra*, ¶ 2333, at 99.

To be sure, some of those who supported enactment of the RPA may have believed that price discrimination was inherently harmful to competition or that competition could flourish only if small businesses were protected from larger and more efficient competitors. Such beliefs do not distinguish the Congress that enacted the RPA from other Congresses that enacted other provisions of the antitrust laws, and therefore do not call for any more blindered interpretation of "competition" in the RPA. Similar concerns are apparent in the legislative history of the Sherman Act, the original Clayton Act, and the 1950 amendments to the Clayton Act. See Hovenkamp, *supra*, 68 ANTITRUST L.J. at 130-132 (discussing populist motivations underlying antitrust laws).

Judicial interpretations of these other antitrust laws, however, have recognized that the concept of "competition" should

not be constrained by economic and political theories of the distant past, because Congress adopted statutory language that invites common-law development of antitrust principles as the business environment changes and as economic learning advances. The same invitation is apparent from the use of the term "competition" in the RPA. There is no more reason for courts construing the RPA to be bound by individual legislators' economic theories about "competition" in 1936, than there is for courts construing the Sherman Act to be bound by legislators' theories about "restraint of trade" (15 U.S.C. § 1) in 1890, or for courts construing Section 7 of the Clayton Act, 15 U.S.C. § 18, to be bound by legislators' theories about mergers' effects on "competition" in 1950.[10]

3. The factual inference authorized by *Morton Salt* does not require extension of the Act to protect competitors, in circumstances in which there is no reasonable possibility that competition will be injured. *Morton Salt* indicated that substantial price differences over time would be sufficient to support a finding of injury to "competition." See 334 U.S. at 47 (evidence supported FTC findings that the effect of discrimination may be injury to "competition"); *id.* at 50 (FTC was justified in finding that "competition" might have been injured). The financial harm to individual competitors who had

[10] The misuse of legislative history is apparent from the *Boise Cascade* dissent. Quoting only committee reports, not the words of the statute, the dissenting judge insisted that "Congress" had stated its intent "clearly." 837 F.2d at 1158. Of course, Congress does not vote on reports, only on bills, so any clear expression was merely by some subset of Members (at most). Even worse, the Third and Ninth Circuits relied on "the floor statement of a congressman in charge of the Conference Report." *Chroma Lighting*, 111 F.3d at 656 (citing *J.F. Feeser*, 909 F.2d at 1533). Worst of all, as we have explained in text, the quoted legislative history need not be read to contradict the natural reading of the statutory language – the word "competition" – that would harmonize the language with the rest of antitrust law, yet several courts and individual judges have so read it.

to pay more was not, itself, deemed to be constitute the relevant injury; the Court indicated that substantial price differences supported an inference of injury to the "competitive opportunities" of disfavored merchants. *Id.* at 46. See also *J. Truett Payne*, 451 U.S. at 561 (plaintiff not entitled to "automatic damages" measured by the amount of the discrimination).

Even under a broad reading of *Morton Salt* that would permit the requisite injury to competition to be inferred from injury to individual competitors, there is no reason to treat that inference as one that is irrebuttable. This Court has held that the inference *can* be rebutted. *Falls City*, 460 U.S. at 435. As Judge Starr explained for the court in *Boise Cascade*, "Robinson-Patman has not ushered in a bizarre rule of law that exalts theory 'no matter what' in the face of hard, cold facts." 837 F.2d at 1146. The words of the statute, its legislative history, and *Morton Salt* are congruent with the principle consistently applied in other antitrust cases: When there is no reasonable possibility that an injury to competitors will produce injury to competition, there is no violation of the law.

4. Reeder's evidence falls far short of showing an injury to intra-brand "competition" with other Volvo dealers, let alone a broader injury to "competition" in any "line of commerce" that encompasses competition among Volvo and non-Volvo truck dealers. Reeder's evidence shows that Volvo's dealer network was competitive both in structure and in behavior. Volvo had 146 dealers in 1997, and the "Volvo Vision" business strategy, if and when fully implemented, would have retained 75 Volvo dealers across the country. Pet. App. 3a. As Reeder itself points out, Volvo's dealers were free to sell to customers anywhere in the country. There was no evidence suggesting that customers would be unable to attract competitive bids from multiple Volvo dealers if they wanted to do so. Dealer profit margins were narrow, and dealers were selling Volvo trucks in large quantities; 1999 was a record year for dealers' sales of Volvo trucks. Pet. App. 16a-17a.

Reeder offered no explanation of how Volvo could possibly benefit by reducing the competitiveness of its dealers.

> Antitrust analysis generally assumes that the manufacturer is best off when its distribution system as a whole distributes the largest possible output at the lowest possible markup. As a result, when a supplier makes an independent choice to charge higher prices to smaller or less aggressive or more poorly placed dealers, we cannot presume that the supplier is acting so as to make its distribution function in a less competitive manner.

Hovenkamp, *supra*, 68 ANTITRUST L.J. at 126. Such a presumption is especially inappropriate when the dealer who pays the "higher" price is not competing for the same customer as the dealer who pays the lower price. The price differential in such circumstances may simply reflect the fact that the manufacturer has less reason to offer price concessions to attract the business of certain retail customers – perhaps because sales to those customers are likely without discounts or because they provide less value to the manufacturer – and that the "disfavored" dealer's sales efforts are disproportionately focused on those retail customers. Conversely, larger discounts may be a way for the manufacturer to encourage more intensive efforts by its dealer to sell to other retail customers, who would otherwise turn to a different manufacturer's products or who are particularly valuable customers.

The absence of any plausible anticompetitive motivation in this case is coupled with behavior – Volvo's *reduction* of prices to induce truck users to buy Volvo trucks, rather than trucks produced by other manufacturers – that manifestly enhanced the competitive prospects of Volvo dealers when they competed against non-Volvo dealers. Volvo's so-called discrimination could hardly have injured intra-brand competition because, for all practical purposes, Reeder did not even engage in intra-brand competition. If Reeder suffered any injury at all, it was merely the injury of paying more than it would have liked. That

"injury" to a competitor does not constitute an injury to competition and is insufficient to support a judgment that Volvo acted in violation of the RPA.

* * * * *

Over the course of more than four decades, this Court has emphasized adherence to the language of the RPA, frequently noting that faithfulness to the statute's language is especially important because expansion of the Act's coverage would operate to the detriment of consumers and the goals of other provisions of the antitrust laws. See *Brooke Group*, 509 U.S. at 220; *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 568 n.27; *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80; *Automatic Canteen*, 346 U.S. at 63. Lower courts, unfortunately, have often failed to heed those admonitions. See, *e.g.*, Hovenkamp, *supra*, 68 ANTITRUST L.J. at 143 ("Robinson-Patman case law maintains an excessively broad conception of competitive injury because it has ignored important constraints that are explicit in that statute's own language and legislative history. The courts have taken a piece of legislation that was anticompetitive enough and made it even more anticompetitive by ignoring its principal concern * * * and its limiting language.").

In this case, the lower courts departed from the statute's clear language *and* from a substantial and consistent body of judicial decisions that correctly construed that language, leading to a judgment that radically and dangerously expands the reach of the Robinson-Patman Act. That judgment cannot stand if this Court holds, as the statutory text requires, that the Robinson-Patman Act makes it unlawful only to "discriminate in price between different *purchasers* * * * where *the effect of such discrimination* may be substantially * * * to injure, destroy, or prevent *competition* with *any person who* * * * *knowingly receives the benefit of such discrimination*." Whether the Court focuses on the straightforward terms "person who * * * knowingly receives the benefit" (Point I) and "purchasers" (Point II), or reaches the more controversial question of what it means "to

injure, destroy, or prevent competition" (Point IV), the statutory language requires reversal, and considerations of antitrust policy and coherence make that result all the more warranted.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC., PETITIONER

v.

REEDER-SIMCO GMC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a manufacturer that offers different wholesale prices to its dealers may be held liable for unlawful price discrimination under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), in the absence of a showing that it discriminated between dealers competing to resell its product to the same retail customer.

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In the Supreme Court of the United States

No. 04-905

VOLVO TRUCKS NORTH AMERICA, INC., PETITIONER

v.

REEDER-SIMCO GMC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission (FTC) enforce the federal antitrust laws. The FTC has developed much of the jurisprudence under the Robinson-Patman Act through administrative enforcement proceedings. This case presents significant questions concerning the reach of that Act's prohibition of price discrimination. Because those questions implicate the pro-competition policies that underlie the antitrust laws generally and that inform the proper interpretation of the Robinson-Patman Act in particular, the government has a substantial interest in their correct resolution.

STATEMENT

Respondent Reeder-Simco GMC, Inc. (Reeder) was an authorized dealer in heavy trucks manufactured by petitioner Volvo Trucks North America, Inc. (Volvo). Reeder

sued Volvo, claiming that Volvo violated Section 2(a) of the Clayton Act, ch. 323, 38 Stat. 730, as amended by the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. 13(a) (Robinson-Patman Act or the Act), by discriminating in the prices it charged its dealers for heavy trucks. The Robinson-Patman Act provides, in relevant part:

> It shall be unlawful for any person engaged in commerce * * * to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. 13(a). A jury found Volvo liable and awarded damages. The district court denied Volvo's motion for judgment as a matter of law, and the court of appeals affirmed. Pet. App. 1a-27a.

1. Volvo manufactures heavy trucks. Reeder, whose dealership is located in Fort Smith, Arkansas, became an authorized Volvo heavy-truck dealer in 1995, pursuant to a five-year franchise agreement with automatic one-year extensions if Reeder met sales objectives established by Volvo. Pet. App. 2a. Reeder generally sold Volvo's trucks through a competitive bidding process. *Id.* at 2a-3a. That process works as follows: a potential heavy-truck buyer (customer) seeks bids from several dealers. The customer's choice of dealers from which to seek bids is influenced "by such factors as an existing relationship, geography, reputation, and cold calling or other marketing strategies initiated by individual dealers." *Id.* at 28a-29a (Hansen, J., concurring in part and dissenting in part). Once a Volvo dealer such as Reeder receives the customer's specifications, it turns to

Volvo and seeks a discount (concession) off the wholesale price (which Volvo set at 80% of the published retail price). *Id.* at 2a. Volvo's precise method for calculating the concession offered a dealer is kept confidential to protect its ability to compete with other manufacturers. *Id.* at 2a-3a.

The concession that Volvo provides to a dealer is effectively an offer to sell, which the dealer uses to determine the price that it, in turn, will offer to the retail customer. The dealer purchases the trucks from Volvo only in the event its bid to the customer is successful. Pet. App. 2a. If the dealer's bid is successful and it purchases the trucks, Volvo proceeds to build them to meet the customer's specifications. *Ibid.*; C.A. App. 1485.

Reeder was one of many Volvo dealers, each of which is assigned a geographic territory. Reeder's territory included ten counties in Arkansas and two in Oklahoma. Pet. App. 11a. Nothing prohibits a Volvo dealer from bidding outside its territory, but Reeder rarely bid against another Volvo dealer. *Id.* at 4a, 11a-12a. And when more than one Volvo dealer is solicited by the same retail customer, Volvo's stated policy was to provide the same price concession to the Volvo dealers competing head-to-head for the sale. C.A. App. 1161-1162, 1621.

In 1997 Volvo announced its "Volvo Vision" program, designed to meet "Volvo's challenges" in the market for heavy trucks, including Volvo's perception that it had too many dealers serving areas that were too small. Pet. App. 3a. Reeder "came to suspect it was one of the dealers Volvo sought to eliminate" and to believe that other Volvo dealers were receiving more favorable price concessions. *Id.* at 4a.

2. Reeder filed suit against Volvo in February 2000, alleging secondary-line injury from price discrimination under

the Robinson-Patman Act.[1] At trial, Reeder's vice-president, William E. Heck, acknowledged that Volvo's policy was to offer equal concessions to Volvo dealers bidding against one another for a particular contract, but he contended that the policy "was not executed." C.A. App. 1162. Reeder offered evidence concerning two occasions over the course of the five years of its authorized dealership when Reeder bid against other Volvo dealers for a particular sale. Pet. App. 4a, 12a.[2] On one occasion, Volvo ultimately offered both dealers the identical concession (18.9%), and neither won the bid. C.A. App. 1267-1273, 1628. The other occasion involved Hiland Dairy, which solicited bids from both Reeder and Southwest Missouri Truck Center. The record reveals that Volvo offered the two dealers the same concession, and Hiland selected Southwest Missouri (from which it had purchased trucks before). *Id.* at 1626-1627. After selecting Southwest Missouri, however, Hiland insisted on the price that Southwest Missouri had bid prior to a general increase in Volvo's prices, and Volvo only then increased the discount. *Id.* at 1627. Compare *id.* at 1625-1628 with *id.* at 1483-1488; see Pet. App. 31a (Hansen, J., concurring in part and dissenting in part).

Reeder also presented evidence comparing the concessions available to it when it bid against non-Volvo dealers to

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[1] "Secondary-line" injury is injury to competition at the level of a customer of the discriminating seller. The complaint also alleged "primary-line" injury (injury to competition at the level of the discriminating seller), but the district court granted Volvo summary judgment on that claim, Pet. App. 40a, and it is not at issue here. The complaint also alleged state law causes of action, including a claim under the Arkansas Franchise Practices Act on which Reeder prevailed before a jury and on appeal. That claim too is not at issue here.

[2] Heck testified that Reeder had competed with another Volvo dealer for a sale two or three times, C.A. App. 1489-1490, but the court of appeals mentioned only the two instances detailed in the appellate record.

concessions available to other Volvo dealers bidding for other sales. Reeder's evidence compared the concessions it received on four occasions when it bid successfully against non-Volvo dealers (and thus purchased Volvo trucks) with the more favorable concessions available to other successful Volvo dealers in connection with different sales on which Reeder did not bid. Pet. App. 4a-6a.[3] Additionally, Reeder offered a comparison of the concessions Volvo offered it on occasions when it bid unsuccessfully against non-Volvo dealers (and therefore did not purchase Volvo trucks) with more favorable concessions available to other Volvo dealers when they made different sales on which Reeder did not bid. *Id.* at 6a.

Heck testified that, in assembling that information, Reeder did not look for instances in which Reeder received a *larger* concession than another Volvo dealer, although it was "quite possible" such instances occurred. C.A. App. 1462. Nor did Reeder perform a statistical analysis to determine whether Reeder was disfavored on average as compared to other dealers. *Id.* at 1462-1464.

The jury found that there was "a reasonable possibility that discriminatory pricing may harm competition between [Reeder] and other retail dealers of Volvo trucks," and that Volvo's discriminatory pricing injured Reeder. Pet. App. 38a. It further found that Reeder's damages from Volvo's Robinson-Patman violation exceeded $1.3 million. *Ibid.* The district court summarily denied motions for judgment as a matter of law and new trial or remittur (*id.* at 35a), awarded treble damages, and entered judgment. *Id.* at 33a.

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[3] The comparisons involved sales that were as far as seven months apart and that were for trucks containing different components. Pet. App. 4a-6a, 12a-13a; see C.A. App. 1574-1584. None of the sales-to-sales comparisons involved a dealer with which Reeder had competed in the head-to-head comparisons.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-32a. The court recognized that to prove a Robinson-Patman Act violation, Reeder had to establish several elements, including that (1) "Volvo discriminated in price between Reeder and the favored dealers"; and (2) "this price discrimination substantially affected competition between Reeder and the favored dealers."[4] *Id.* at 8a. With respect to the first element, the court explained that, "because the [Act] prohibits price discrimination 'between different purchasers,' * * * Reeder had to show there were actual sales at two different prices to two different Volvo dealers, i.e., a sale to itself and a sale to another Volvo dealer." *Ibid.* (quoting 15 U.S.C. 13(a)). Noting that "an unsuccessful bidder is not a purchaser within the meaning of the [Act]," *id.* at 9a, the court relied entirely on the evidence of the four occasions on which Reeder bid successfully against non-Volvo dealers in finding the two-purchase requirement satisfied. It concluded that those four Reeder purchases "gave Reeder 'purchaser' status," making Reeder eligible "to pursue a claim for price discrimination." *Id.* at 10a.

Although Reeder and the other Volvo dealers involved in the sales comparisons did not bid against each other, and although no other comparisons involved Reeder purchases from Volvo, the court next concluded that Reeder established that it was a purchaser "in actual competition with" the favored dealers because "as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market." Pet. App. 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)).

[4] Reeder also had to show that "the trucks sold by Reeder and the other dealers were of like grade and quality." Pet. App. 8a. The court concluded that although the sales Reeder identified as a basis for comparison involved trucks with different components, *id.* at 12a-13a; see C.A. App. 1572-1584, a jury could properly conclude that the trucks in each comparison were "commodities of like grade and quality," 15 U.S.C. 13(a). Similarly, although the sales that Reeder compared were made at different times, the court held that they were sufficiently close in time for purposes of establishing price discrimination under the Act. Pet. App. 14a.

The court further held that Reeder could prove competitive injury from price discrimination by showing a "reasonable possibility" that the effect of the discrimination "may be substantially to lessen competition . . . or to injure, destroy, or prevent competition." Pet. App. 14a-15a (quoting 15 U.S.C. 13(a)). The court explained that Reeder could make that showing by "introduc[ing] direct evidence that disfavored competitors lost sales or profits as a result of the discrimination," *id.* at 15a (quoting *Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 385 (8th Cir. 1987)), or by showing "that the favored competitor received a substantial price reduction over a substantial period of time," *ibid.* (quoting *Rose Confections*, 816 F.2d at 385).

The court found that Reeder met both tests. It reasoned that the jury could find that the price discrimination injured Reeder based on evidence that Volvo intended to reduce the number of its dealers, Reeder's loss of the Hiland Dairy contract, Reeder's potential profit had it received the concessions that other dealers received, and Reeder's declining sales. Pet. App. 15a-16a. As for the second test, the court found that the evidence showed "that favored competitors received substantial price reductions over a substantial period of time." *Id.* at 15a.

The court also concluded that Reeder was entitled to treble damages for the Robinson-Patman Act violation found by the jury. The court held that, for the purpose of finding "actual injury" to Reeder and assessing damages, the jury was not limited to evidence of head-to-head competition with favored Volvo dealers or evidence comparing the concessions given to Reeder and other Volvo dealers on the sales they

made. Pet. App. 17a, 20a. Rather, the jury could also rely on evidence of Reeder's "unsuccessful sales due to Volvo's failure to grant requested price concessions." *Id.* at 17a. The court further held that the jury could infer from the evidence that "favored dealers received lower prices," and that "this price advantage allowed other dealers to undercut Reeder's prices, hurting Reeder's sales and profits." *Id.* at 19a. Taking into account evidence that "the elimination of some dealers like Reader appeared to be Volvo's intent," the court concluded that Reeder had established "precisely the type of injury the antitrust laws were meant to prevent." *Ibid.*

Judge Hansen dissented with respect to the Robinson-Patman Act claim. Pet. App. 27a-32a. He concluded that Reeder "fail[ed] to show injury or likelihood of injury to actual competition between Reeder and the 'favored' Volvo dealers," in essence because "the parties in this case operate in a unique marketplace where special-order products are sold to individual, pre-identified customers only after competitive bidding. By its very nature, this process will never produce the kind of competition the [Act] was designed to protect because it will never result in the type of two-purchase transaction that itself creates a market for the goods that are sold." *Id.* at 27a-28a. There may be competition among dealers for the opportunity to bid on potential sales, but "[o]nce bidding begins, * * * the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale." *Id.* at 29a. Judge Hansen reasoned that the instances Reeder identified in which it was a "purchaser"—the only instances that could satisfy the Act's two-purchaser requirement—were "simply * * * not relevant to proving a violation of the [Act] because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." *Ibid.* And "[w]ithout proof of actual competition" for the same customer(s) when the requisite purchases were made, "Reeder cannot demonstrate a reasonable possibility of competitive injury." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals' decision cannot be reconciled with the terms of the Robinson-Patman Act or the policies the Act was designed to advance. The court of appeals lost sight of the fact that this case lacks the essential prerequisites for a Robinson-Patman Act claim. As Judge Hansen recognized, this case involves a unique product that is subject to special order and is sold through a customer-specific competitive bidding process. That process forecloses the type of competition between different purchasers for resale of the purchased product that the Robinson-Patman Act's prohibition on secondary-line price discrimination was designed to address. Equally important, there is no evidence of price discrimination in the rare instances in which Reeder competed with another Volvo dealer to make a sale. This case thus lacks the essential feature of price discrimination among competitors. As a result, Reeder cannot claim to have suffered the kind of injury that the Robinson-Patman Act seeks to remedy. Whatever rights Reeder may have under state laws designed to protect franchisees, the secondary-line prohibitions of Section 2(a) of the Robinson-Patman Act do not address practices not involving price discrimination between competing purchasers.

In this case, the court of appeals extended the Robinson-Patman Act's prohibition on secondary-line price discrimination to protect a firm that did not compete with a favored purchaser and thus did not suffer price discrimination within the meaning of the Act. Reeder offered no evidence that its supplier, Volvo, ever offered it a less favorable price than it offered to another Volvo dealer competing against Reeder for a sale. Despite the absence of competition between

Reeder and the favored Volvo dealers to resell trucks purchased from Volvo at different prices, the court of appeals found sufficient evidence to uphold a jury finding of liability, a result that finds no support in the statutory language or purpose and that threatens to undercut the pro-competitive policies of the antitrust laws.

This Court's Robinson-Patman secondary-line cases have emphasized that the Act addresses "price differentials between *competing* purchasers sufficient in amount to influence their resale prices." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 47 (1948) (emphasis added). In cases involving such "competing purchasers," this Court has permitted competitive injury to be inferred from price discrimination between them over a substantial period of time. *Id.* at 50; *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983). That inference is unavailable to Reeder, however, because it failed to establish that it was the victim of price discrimination affecting competition for sales between it and favored Volvo dealers.

Construing the Robinson-Patman Act to reach the varying prices at which a manufacturer sells to its dealers when they do not compete with each other for a sale could severely restrict a manufacturer's ability to compete effectively with other manufacturers. It would sacrifice vibrant interbrand competition, the "primary concern of antitrust law," *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977), for an illusory gain in intrabrand competition. The Robinson-Patman Act requires no such anti-competitive result.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT VOLVO VIOLATED THE ROBINSON-PATMAN ACT

"It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). As this Court explained in *Brooke Group*, the Robinson-Patman Act is no exception. 509 U.S. at 220. The Act bans certain forms of price discrimination between actual competitors. The Act does not, however, ban price discrimination between purchasers who are not competing to resell the manufacturer's product to the same customer.[5]

The court of appeals failed to recognize that limitation here, upholding a finding of competitive harm from price discrimination in the absence of evidence that Reeder was in competition with the favored dealers. In so holding, the court of appeals ignored not only the language of the statute, but also the canon of construction that the Robinson-Patman Act, no less than the Sherman Act or other parts of the Clayton Act, "should be construed consistently with broader policies of the antitrust laws." *Brooke Group*, 509 U.S. at 220

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[5] The requisite competition to sell to the same customer may also occur downstream in the chain of distribution. See *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983); 15 U.S.C. 13(a) (banning price discrimination between purchasers that may injure "competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them"). Reeder never alleged injury to competition with the customers of favored Volvo dealers, and so accordingly our formulations of the statutory requirement here do not, in general, highlight downstream competition, although they should be understood to encompass it.

(quoting *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 n.13 (1979)).

A. Section 2(a) of The Robinson-Patman Act Does Not Prohibit All Price Differentials, But Targets Price Discrimination Between Competing Purchasers

1. Congress enacted the Robinson-Patman Act to remedy what it perceived as unfair and economically unjustified pricing concessions granted to large retail chains at the expense of competing independent merchants. See *FTC* v. *Fred Meyer Inc.*, 390 U. S. 341, 349-350 (1968); *FTC* v. *Henry Broch & Co.*, 363 U. S. 166, 169 (1960); Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act* 11 (1962); 1 ABA Antitrust Section, Monograph No. 4, *The Robinson-Patman Act: Policy and Law* 21 (1980). A theme of the congressional debate on the Act was the need to combat the "increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers." *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 75-76 (1979). Congressman Patman offered the following paradigmatic example:

> You have a chain store on one side of the street that is getting special benefits, special discounts, special commissions and bonuses, and they are enabled to put the same goods on their shelves as the independent across the street puts on his shelves at 20 percent less * * *. The independents, now, on the other side of the street, have not only got to compete with that corporate chain in their prices—because people do consider the price when they purchase goods in this country—but they must also extend credit and run the risk of getting their money after they let the goods go. They must also render special services like delivery, and things like that, in order to get any business at all.

To Amend the Clayton Act: Hearings on H.R. 8442, H.R. 4995, and H.R. 5062 Before the House Comm. on the Judiciary, 74th Cong., 1st Sess. 5 (1935) (testimony of Hon. Wright Patman) (Patman Testimony). Although price discrimination was already proscribed in Section 2 of the original Clayton Act, that law was considered inadequate to address the perceived harm to competition posed by the advent of the dominant chain store. See 3 Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law* § 22.2, at 250-251 (1983).[6]

The Robinson-Patman Act's price discrimination provision thus focuses on the concern Congressman Patman identified: price discrimination between two purchasers that impairs the disfavored purchaser's ability to compete with the favored purchaser. It prohibits discrimination in price "between different purchasers of commodities of like grade and quality" (the commodities purchased for the shelves of the chain store and the independent across the street),[7] but only if the two purchasers are competing and if "the effect of such

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[6] As originally enacted, the Clayton Act outlawed price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Clayton Act, ch. 323, § 2, 38 Stat. 730. Congress's focus in enacting the Clayton Act's price discrimination provision was primary-line injury, *Mennen Co.* v. *FTC*, 288 F. 774, 778-782 (2d Cir.), cert. denied, 262 U.S. 759 (1923), although this Court held that it reached some situations involving secondary-line injury, *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 251-54 (1929).

[7] The very nature of the market for heavy-duty trucks—that the trucks are built to meet a particular customer's specifications and include different components—casts doubt on the court of appeals' conclusion (Pet. App. 12a-13a) that the trucks involved in different competitive bids were "commodities of like grade and quality" within the meaning of the Act. 15 U.S.C. 13(a). As explained below, the court of appeals has taken the Act far afield by applying it to purchases of trucks with different components made months apart by dealers who were not competing to resell their trucks to the same customers.

discrimination may be substantially to lessen competition" generally "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. 13(a). Thus, although the Act does not "require that the discriminations must in fact have harmed competition," *Corn Prods. Ref. Co.* v. *FTC*, 324 U.S. 726, 742 (1945), there must "be 'a reasonable possibility' of substantial injury to competition before its protections are triggered," *Brooke Group*, 509 U.S. at 222 (quoting *Falls City*, 460 U.S. at 434). See generally Herbert Hovenkamp, *The Robinson-Patman Act And Competition: Unfinished Business*, 68 Antitrust L.J. 125, 134-135 (2000). There can be no "reasonable possibility" of substantial injury to competition under the Robinson-Patman Act in the absence of price discrimination between purchasers in actual competition for the same customers.

In Congressman Patman's example, the connection between the price discrimination and the injury to the disfavored purchaser's ability to compete with the favored purchaser is straightforward and clear. As he noted, "people do consider the price when they purchase goods in this country." Patman Testimony 5. The potential customer, faced with the independent store on one side of the street and the chain store on the other, may choose to buy from the chain store at the lower price the discrimination enabled the chain store to charge, depriving the independent of the sale. Alternatively, the disfavored independent may attract the customer by lowering its price or increasing its services, thereby reducing its profits. In either case, the injury to the independent comes about and is covered by the Act because the independent is in "competition with" the chain store—*i.e.*, the party "who * * * knowingly receives the benefit of" the price discrimination, 15 U.S.C. 13(a)—in its efforts to resell the goods purchased from the manufacturer.

2. This Court's cases confirm that secondary-line price discrimination is cognizable under the Act only when the "purchases involved in such discrimination" (15 U.S.C. 13(a)) are made by purchasers who are competing to make sales. In *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), the defendant offered quantity discounts to all, but only five retail grocery store chains could take advantage of them. As a result, the chains could sell the salt at retail for less than wholesale purchasers "could reasonably sell the same brand of salt" to independent retailers competing with the chains' local stores. *Id.* at 41. The Court found it "self-evident," *id.* at 50-51, that evidence of "price differentials between *competing* purchasers sufficient in amount to influence their resale price of salt," *id.* at 47 (emphasis added), was sufficient to support a finding that there is a reasonable possibility of an adverse impact on competition. See also *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 546 (1960) ("The existence of competition among buyers who are charged different prices by a seller is obviously important in terms of adverse effect upon secondary line competition.").

The Court elaborated on *Morton Salt* in *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983). Falls City, a brewer, sold beer to wholesaler Vanco at a higher price than it charged to wholesaler Dawson Springs. Although *Morton Salt* held that "injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time," 460 U.S. at 435 (citing *Morton Salt*, 334 U.S. at 46, 50-51), proof of the difference in price to the two wholesalers did not suffice to establish a violation because they "did not compete with each other at the wholesale level; Vanco sold only to Indiana retailers and Dawson Springs sold only to Kentucky retailers," *id.* at 436. The retailers to whom they sold, however, did compete with each other: Lower prices attracted Indiana customers to Kentucky to buy beer (as direct evidence of

diverted sales showed, see *id.* at 437 n.8), which led Indiana retailers to buy less from Vanco. Because the Act reaches downstream to the injury to the competing customers of favored and disfavored purchasers, that *retail diversion*—but not the wholesale price differential itself—satisfied the competitive injury element of a prima facie case. *Id.* at 436.[8]

As this Court's cases and the statutory language thus make plain, price discrimination made unlawful under Section 2(a) of the Robinson-Patman Act must, at a minimum, threaten "injury to purchasers who are in competition with each other." Wright Patman, *The Robinson-Patman Act* 15 (1938).[9] As explained below, because Reeder did not establish that Volvo engaged in price discrimination in any transaction in which Reeder was competing with another Volvo

[8] Similarly, in *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990), the Court held that an oil company's price discrimination between retailers and wholesale buyers who also sold at retail fell within the Act's prohibition, noting that "[t]o the extent" the wholesalers "competed with" the disfavored retailers for sales, the *Morton Salt* inference would be appropriate. 496 U.S. at 570. The evidence showed diversion of customers from the complaining retailers to gasoline stations supplied by the favored wholesalers. *Id.* at 571-72.

[9] Because, as explained in Part B, *infra*, the court of appeals erred in finding that Volvo engaged in price discrimination in any transaction in which Reeder was in actual competition with the favored dealers, this Court need not address the question whether proof of injury to a purchaser from price discrimination in favor of a competing purchaser suffices to establish the reasonable possibility of harm to competition required for a finding of liability for secondary-line injury under the Act. Compare, *e.g.*, *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127, 1143 (D.C. Cir. 1988) (requiring "[i]njury to competition"), with *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 653, 655-657 (9th Cir.) (rejecting *Boise* and holding that proof of effect on individual competitor is sufficient), cert. denied, 522 U.S. 943 (1997), and *J.F. Feeser, Inc.* v. *Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990) (holding that "evidence of injury to a competitor may satisfy the component of competitive injury" required by the Act), cert. denied, 499 U.S. 921 (1991).

dealer, the court of appeals erred in holding Volvo liable for price discrimination under the Act.

B. The Court of Appeals Improperly Found A Violation Of The Act Because Volvo Did Not Engage In Price Discrimination In Any Transaction In Which Reeder Was Competing With Another Volvo Dealer

In upholding the jury verdict finding Volvo liable under the Robinson-Patman Act, the court of appeals expanded the law's reach in a manner foreclosed by its language and purpose and by decisions of this Court requiring (at a minimum) proof of price discrimination between competing purchasers or between purchasers whose customers are competing with one another. *Morton Salt*, 334 U.S. at 47; *Falls City*, 460 U.S. at 436. Cf. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 201 (1974) (refusing to extend the Act "beyond its clear language to reach a multitude of local activities that hitherto have been left to state and local regulation"). In this case, there simply was no evidence that Volvo engaged in price discrimination in any transaction in which Reeder actually competed with another Volvo dealer for a sale. The court reached its erroneous conclusion by treating the statutory requirements, the "conditions which make a price difference illegal or legal," *Anheuser-Busch*, 363 U.S. at 550, as a collection of independent hurdles, unrelated to one another or to the purpose of the statute, rather than as an "integrated statutory scheme," *ibid.*

1. The court began its analysis with the statutory requirement that there be discrimination "between different purchasers," 15 U.S.C. 13(a)—the "two-purchase requirement." Pet. App. 8a-11a. Correctly recognizing that "an unsuccessful bidder is not a purchaser" for that purpose, *id.* at 9a,[10] the court focused—solely for purposes of that require-

[10] See, *e.g.*, *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 755 (1947) ("[N]o single sale can violate the Robinson-Patman Act. At least

ment—on the evidence relating to the four retail sales that Reeder made (for which it was not competing with any other Volvo dealer). Because Reeder purchased trucks from Volvo in connection with those sales, the court of appeals concluded, Reeder had "'purchaser' status" entitling it "to pursue a claim for price discrimination." *Id.* at 10a. The court did not require any showing that goods were purchased for resale in competition with another purchaser of comparable goods from the same supplier, as would obtain in the paradigmatic scenario in which a chain store and an independent store purchase products with an eye towards reselling them to the same customers. See, *e.g.*, *M.C. Mfg. Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059, 1068 (5th Cir. 1975) (defen-

---

two transactions must take place in order to constitute a discrimination."); *Hasbrouck*, 496 U.S. at 577 (Scalia, J., concurring in the judgment) (violation of Robinson-Patman Act requires proof that, *inter alia*, "the seller discriminates in price between purchasers"); *Shaw's, Inc.* v. *Wilson-Jones Co.*, 105 F.2d 331, 333 (3d Cir. 1939) ("The discrimination in price referred to [in the Robinson-Patman Act] must be practiced 'between different purchasers.' * * * It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase, as the appellant contends."); *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604, 615 (4th Cir. 1985) (affirming dismissal of Robinson-Patman claim in absence of allegations or proof of "two comparable, completed sales"); *M.C. Mfg. Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059, 1067 & n.17 (5th Cir. 1975) (bidders competing for same contract cannot satisfy Act's two-purchase requirement), cert. denied, 424 U.S. 968 (1976); but see, *e.g.*, *Allied Accessories & Auto Parts Co.* v. *General Motors Corp.*, 901 F.2d 1322 (6th Cir. 1990) (affirming award of damages for Robinson-Patman violation where plaintiff was disappointed competitive bidder); *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir.) (stating that plaintiff was not obligated to make purchase at discriminatory price to obtain relief under the Act where the failure to make the purchase "was directly attributable to defendant's own discriminatory practice"), modified on other grounds, 190 F.2d 73 (5th Cir. 1951).

dant not liable under the Act for price discrimination where "his buyers are not in competition for the same ultimate users"), cert. denied, 424 U.S. 968 (1976); 14 Herbert Hovenkamp, *Antitrust Law* ¶ 2333b, at 89 (1999) (favored and disfavored purchasers "must be competing resellers, which is what the statute means when it speaks of injury to the disfavored purchaser's ability to compete with the favored purchaser") (footnote omitted).

In support of its view that any purchase—no matter how unrelated to the challenged discrimination in pricing—suffices to satisfy the two-purchaser requirement, the court of appeals cited only *DeLong Equip. Co.* v. *Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1202 (11th Cir.), cert. denied, 510 U.S. 1012 (1993), which it characterized as "recognizing that even 'minimal sales' (i.e., minimal purchases from manufacturer) made by an otherwise unsuccessful bidder are enough for [a] bidder to state" a claim under the Act. Pet. App. 11a. But *DeLong* involved "minimal sales" by one distributor to another distributor's *customer*, Pratt. The minimal sales to Pratt established that the two distributors, who received different prices from the defendant supplier, "directly competed" for sales to Pratt, and "were after the same Pratt dollar." *DeLong*, 990 F.2d at 1202. There would have been no need for the Eleventh Circuit to rely on the "minimal sales" if it had been following the approach of the court of appeals here, because both distributors routinely purchased from the defendant supplier. *Id.* at 1190.

Unlike in *DeLong*, Reeder and the favored dealers against which Reeder compared its purchases did not compete to resell the trucks they purchased to the same customers. To the contrary, the evidence showed that Reeder and the other Volvo dealers only made their purchases from Volvo once they had won their competitive bids and secured a customer. Because Reeder and the favored dealers were not competing for the same customers when they made their respective

purchases, they were not "different purchasers" in "competition" with each other in the sense required by the Act.[11]

2. The court of appeals also erred in concluding that Reeder was in "actual competition" with the favored Volvo dealers. Pet. App. 11a-12a. The court reasoned that "as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level * * * and within the same geographic market." *Id.* at 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)). Relying on evidence that Reeder sold or delivered trucks in many States and made sales or bids in three States in particular, that other Volvo dealers also made sales or bids in those States, that Reeder "competed directly" with other Volvo dealers in two instances, and that customers could travel to purchase heavy trucks, the court found that the record supported a jury finding that Reeder was in actual competition with favored dealers. *Id.* at 11a-12a. But the court ignored that Volvo dealers generally did not compete in the same solicitations

[11] Reeder's Robinson-Patman Act claim fails for that reason. The statute's requirement of two purchases also means that Reeder's claim simply cannot succeed, even assuming it had demonstrated that Volvo discriminated with respect to its price quotes to Volvo dealers in head-to-head competition for a single sale. In this case, purchases were made as a result of special-order bidding such that, for every completed sale, there was only one successful bidder and hence only one purchaser from Volvo. The two-purchase requirement would therefore bar Reeder from complaining that differing discounts on sales by Volvo caused it to lose the bid. See note 10, *supra*. That result is consistent with the Act's focus on competition in connection with the distribution of fungible goods. See Pet. App. 27a-28a (Hansen, J., concurring in part and dissenting in part). Of course, even if the textually rooted two-purchase rule were to be relaxed to account for the special context of special-order bidding, the absence of any evidence of price discrimination in the rare instances in which two Volvo dealers competed for the same order would suffice to preclude a finding of a Robinson-Patman Act violation here.

and failed to recognize that, when they did, Volvo's policy was to offer each the identical discount. There is no evidence here that Volvo deviated from that policy in the rare instances in which Reeder competed head-to-head with another Volvo dealer for the same customer. In the absence of discrimination between resellers actually competing for the same customers, there can be no Robinson-Patman violation.

The *Best Brands* standard applied by the court of appeals may make sense in the context of the chain store and independent retailer that Congress had in mind in adopting the Act, but it was misapplied here to obscure the absence of actual competition in the particular market at issue. As Judge Hansen pointed out, although Volvo dealers may "have competed against each other" in a market "to receive the opportunity to bid on potential sales to customers" in a broad geographic area, "[o]nce bidding begins, * * * the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale." Pet. App. 28a-29a. That dealers bid for sales in the same multistate area, or that customers and trucks may travel, does not show that the Volvo dealers were in actual competition for the same sales in any sense relevant to the Act, for they never purchased trucks with an eye toward reselling them to the same customer, and they rarely even bid against one another. Indeed, the court of appeals identified only two occasions over the course of the five-year franchise term on which Reeder was in actual competition with another Volvo dealer for the same sale. Pet. App. 4a, 11a-12a. And on those isolated occasions, Volvo did not engage in price discrimination between Reeder and the competing dealer. See p. 4, *supra*. The court erred in treating that head-to-head competition—which was devoid of price discrimination between Volvo dealers—as a license to pursue claims that did not involve actual competition for a sale or the kind of competitive injury that the Act addresses.

3. The court of appeals' conclusion that there was sufficient evidence for a jury to find the requisite competitive injury is necessarily flawed as well, because it is predicated on the erroneous finding that Volvo engaged in price discrimination in a transaction in which Reeder was competing with a favored dealer. As explained above, there was no evidence of such a transaction. Accordingly, Reeder could not prove competitive injury either through direct evidence of lost sales or profits as a result of the price discrimination or by establishing the prerequisites to application of the *Morton Salt* inference. Pet. App. 15a (citing *Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 385 (8th Cir. 1987)).

a. Contrary to the court's conclusion, Reeder did not make the first showing, because, in Reeder's two instances of head-to-head competition with other Volvo dealers, it neither purchased Volvo trucks (as required by the Act's text) nor lost sales because of discriminatory concessions. Because Volvo did not engage in price discrimination between competing Volvo dealers, it is not surprising that Reeder offered no direct evidence of lost sales or profits resulting from price discrimination.[12]

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[12] The absence of evidence that price discrimination caused a diversion of profits from Reeder to the favored dealers stands in stark contrast to cases in which violations of the Robinson-Patman Act have been found. For example, in *Rose Confections*, 816 F.2d at 385-386, the disfavored chocolate-chip rebagger provided testimony that it lowered its prices to customers in response to competition from the favored customer and unsuccessfully sought business from potential clients who then bought from the favored distributor. No such evidence was adduced here. See *Hasbrouck*, 496 U.S. at 571 ("respondents introduced evidence describing the diversion of their customers to specific stations supplied by Dompier"); *Falls City*, 460 U.S. at 437 & n.8 (finding of violation "supported by direct evidence of diverted sales"); *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 518 (1963) (evidence that customers of disfavored dealers "shifted their patronage" to the favored dealer); *DeLong*, 990 F.2d at 1202 (evidence that disfavored and favored purchaser solicited and sold to the same customer); *J.F. Feeser*, 909 F.2d at 1535-1537 (reversing summary judgment for supplier on Robinson-Patman claim where disfavored wholesaler offered evidence that it lost customers to favored wholesaler on account of price differences). Cf. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 564 n.4 (1981) (observing that claim that auto dealer suffered injury compensable under Robinson-Patman Act in the absence of evidence of diversion of sales is "particularly weak" but finding it unnecessary to decide whether such evidence is required).

The evidence comparing the concessions offered to Reeder on particular sales to concessions available to other Volvo dealers in connection with different sales (on which Reeder did not bid) "simply is not relevant to proving a violation of the [Act] because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." Pet. App. 29a (Hansen, J., concurring in part and dissenting in part). The evidence may suggest that Reeder might have made more sales and earned larger profits had Volvo offered it more favorable concessions. But such lost sales or profits would be attributable to the *size* of the concessions Volvo offered Reeder, not to the alleged fact that Volvo offered other dealers more favorable concessions —*i.e.*, to price, not price discrimination. The existence of allegedly comparable sales on which Reeder did not bid made no difference to Reeder's success or profitability with respect to the sales on which it did bid. Thus, Reeder's real complaint is not that it suffered price discrimination relative to favored Volvo dealers, but rather that Volvo did not offer it more substantial concessions that would have enabled it to bid more successfully against non-Volvo dealers. The Act, however, is concerned with the competitive effects of price discrimination; it does not require a supplier to charge, or offer, a price that will enable a particular purchaser to resell profitably.

Moreover, the court of appeals pointed to no evidence that the less favorable concessions offered to Reeder in connection with its sales had any influence on Reeder's opportunities vis-a-vis other Volvo dealers to bid for sales. Even had there been such evidence, it would not establish a violation of the Act. Permitting liability to be predicated on transactions in which the disfavored and favored purchasers did not compete, as the court of appeals did here, would impermissibly dilute both the two-purchaser and the competitive injury requirements. The court's holding also threatens to convert the law into a guarantee of equitable treatment to franchisees, rather than a targeted protection against price discrimination between purchasers in actual competition, and extends the Act in a manner that would compel a level of price rigidity contrary to the goals of the antitrust laws. See Part C, *infra*; *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80 (warning "against interpretations of the Robinson-Patman Act which extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation") (internal quotation marks omitted). Even assuming the Act covered the injury alleged here, its attenuated nature would call for Reeder to provide concrete evidence of diversion of sales or profits to the favored dealers on account of the price differences. Reeder presented no such evidence.

The court of appeals also relied on evidence that Volvo intended to reduce the number of its dealers during the relevant time period. Pet. App. 15a-16a. But the antitrust laws do not require a business to preserve without change its existing distribution system. The Robinson-Patman Act is not an insurance policy that protects competitors from business practices perceived to be unfair. See *Brooke Group*, 509 U.S. at 225 (the antitrust laws "do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate com-

merce") (internal quotation marks omitted). Whatever harm Reeder allegedly suffered in its business relationship with Volvo cannot be attributed to price discrimination between competing dealers, and it therefore cannot seek refuge under the Robinson-Patman Act. Cf. Pet. App. 23a-27a (upholding jury finding that Volvo violated Arkansas Franchise Practices Act).

b. The court of appeals also erred in holding that Reeder was entitled to the *Morton Salt* inference, which permits competitive injury to be inferred from proof of substantial price discrimination between competing purchasers. *Morton Salt*, 334 U.S. at 47, 50. That inference is unavailable to Reeder for the fundamental reason that, as discussed above, Reeder and the favored dealers were not "competing purchasers" in connection with the scattered instances of price discrimination that Reeder identified over the five-year period.

More broadly, the *Morton Salt* inference should not be invoked blindly to permit findings of Robinson-Patman Act liability where a direct causal link between price discrimination and competitive harm is lacking. Rather, the inference is warranted only to the extent that it yields generally valid predictions about injury to competition. This Court has recognized that even sustained price discrimination between competing purchasers—which Reeder failed to show here—will not always trigger the inference, concluding that the inference "simply will not arise" in cases where "a functional discount is legitimate." *Hasbrouck*, 496 U.S. at 571.

For the same reason, the *Morton Salt* inference also is not appropriate when the disfavored purchaser has ample alternative suppliers. For example, a disfavored purchaser is unlikely to be harmed by discrimination unless either the seller has significant market power or the favored purchaser is significant enough to sellers to demand concessions

unavailable to others.[13] Cf. *Hasbrouck*, 496 U.S. at 580 (Scalia, J., concurring in the judgment) (observing that if a supplier charges less to wholesalers than to retailers and the differential is passed on to the wholesalers' retail customers, competition among retailers cannot be injured if all retailers have the option to purchase from the wholesalers).[14]

C. Extending the Robinson-Patman Act To Reach Volvo's Conduct Would Undercut The Pro-Competitive Policies Of The Antitrust Laws

Even if the language of the Robinson-Patman Act were sufficiently ambiguous to permit the court of appeals' expansive construction, that result would contravene this Court's instruction that the Act "should be construed consistently with broader policies of the antitrust laws." *Brooke Group*, 509 U.S. at 220. Extending the Robinson-Patman Act to reach Volvo's conduct here would not advance Congress's goal of preventing price discrimination that impairs a disfavored purchaser's ability to compete with the favored purchaser. It would, moreover, be likely to lead to anti-competitive consequences.

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[13] The Federal Trade Commission considered those issues in accepting a recent consent order in which all five Commissioners suggested that market power should be viewed as a prerequisite to application of the *Morton Salt* inference. See *McCormick & Co.*, FTC Complaints and Orders, CCH Trade Reg. Rep. [1997-2001 Transfer Binder] ¶ 24,711 (Apr. 27, 2000).

[14] As with analysis of other vertical relationships, the absence of market power in a Robinson-Patman case can indicate that a practice has no potential to harm competition generally. See Hovenkamp, 68 Antitrust L.J. at 126 ("a manufacturer cannot profit by weakening its own distribution system or reducing that system's competitiveness"). See also John L. Peterman, *The Salt Producers' Discount Practices Before and After the Robinson-Patman Act and the FTC's Challenge to Them: The Morton and International Salt Cases*, FTC Bureau of Economics Staff Report 441-454 (1995).

Volvo utilizes its dealers to market and distribute its heavy-duty trucks, in competition with other manufacturers of heavy-duty trucks. Concessions granted to dealers allow Volvo to tailor its pricing to the competitive needs facing Volvo and its dealers in a particular situation. Pet. App. 2a-3a; cf. *Metro Ford Truck Sales, Inc.* v. *Ford Motor Co.*, 145 F.3d 320, 323 (5th Cir. 1998) (noting that Ford "Competitive Price Assistance" to Ford heavy-duty truck dealers ensured that Ford dealers could meet competition from other truck manufacturers in light of "the competitive situation surrounding the particular transaction"), cert. denied, 525 U.S. 1068 (1999). Imposing liability for differences in concessions offered to dealers bidding on different sales would limit suppliers' ability to tailor prices to the competitive situation, and thus diminish the vigor of interbrand price competition.[15]

The court of appeals relied on the Volvo Vision program, which was intended to meet Volvo's challenges by revamping its dealer network, Pet. App. 3a, as evidence supporting Reeder's claim of discriminatory concession practices, *id.* at 16a, and actual injury of the kind the antitrust laws are intended to prevent, *id.* at 19a. But, as this Court recognized nearly 30 years ago, the market impact of vertical practices, such as changes in distribution systems, may be a "simultaneous reduction of intrabrand competition and stimulation of interbrand competition." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51-52 (1977). Because interbrand competition "is the primary concern of antitrust law," *id.* at 52 n.19, courts should be reluctant to interfere with a sup-

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[15] Cf. 14 Herbert Hovenkamp, *Antitrust Law* ¶ 2301a, at 4-6 (1999) (arguing that even where a manufacturer's dealers do compete with each other, differential prices to them would likely provide efficient incentives and would, but for how courts have construed the Robinson-Patman Act, likely be a lawful vertical practice under the antitrust laws).

plier's ability to structure its vertical distribution network efficiently. The Robinson-Patman Act plainly would not prohibit Volvo from simply terminating unwanted dealers in the interest of "achiev[ing] certain efficiencies in the distribution of [its] products." *Id.* at 54. The Act should not be stretched to forbid a manufacturer to achieve the same result by offering some dealers less favorable terms, but without engaging in the kind of price discrimination between competing purchasers that was the subject of congressional concern and that falls within the express terms of the Act. Any remedy for such practices lies in state laws addressing unfair competition and the rights of franchisees, not in the Robinson-Patman Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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v.

REEDER-SIMCO GMC, INC.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF THE NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The National Electrical Manufacturers Association (NEMA) is the leading trade association in the United States representing the interests of electroindustry manufacturers. Founded in 1926 and headquartered in Rosslyn, Virginia, NEMA's over 400 member companies manufacture products used in the generation, transmission and distribution, control,

[1] The parties' written consents to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* state that no counsel for a party has written this brief in whole or in part, and no person or entity, other than *amicus*, its members, or their counsel, has a made a monetary contribution to the preparation or submission of this brief.

and end-use of electricity. Domestic shipments of electrical products within the NEMA scope exceed $100 billion. NEMA membership is divided across 53 different product groups including industrial automation equipment, lighting systems products, electronic equipment, electrical building equipment, electrical insulation products, wire and cable, power equipment sold to electric utilities, and medical imaging equipment. Under NEMA's By-Laws, one of its objectives is "to promote and further the interests of manufacturers of electrical products and the interests of the public in manufacturing, engineering, safety, transportation, and other problems of the electrical industry . . . and to promote the attainment of improved production, enlarged distribution, and increased efficiency in the use of electrical products." Many NEMA member products are marketed and sold through resellers to the ultimate customer under competitive conditions where the reseller requests a special pricing allowance to help win a customer's contract, and under the Eighth Circuit's interpretation of the Robinson-Patman Act in this case they will be compelled to forego or diminish offering competitive pricing allowances in heretofore entirely lawful, procompetitive transactions in order to avoid the risk of treble damage liability.

The questions presented for review in this case are of enormous significance for the manufacturers, distributors, and consumers of goods, including electrical products, sold in interstate commerce, because the Eighth Circuit Court of Appeals' decision in this case threatens substantially to reduce highly competitive project transaction pricing and supplant it with a greater incidence of price rigidity and more static market structures thereby harming competition, not preventing its injury. The Eighth Circuit's decision further threatens to disrupt efficiencies in the distribution channel by turning distributors who serve as important market makers for their suppliers' products and sources of value-added services into mere logistical supply managers.

One of NEMA's members who sells lighting systems components prevailed in a Robinson-Patman Act case based on a ruling that is entirely at odds with one of the holdings of the Eighth Circuit Court of Appeals in this case. Compare *Perkasie Industries Corp. v. Advance Transformer, Inc.*, 1992-2 Trade Cas. (CCH) ¶ 70,046 (E.D. Pa. 1992), *aff'd*, 19 F.3d 644 (3rd Cir. 1994).

Amicus curiae submits this brief to assist the Court in understanding the economic significance of the Robinson-Patman Act issues presented by this case, not just in the transactional circumstances present in truck distribution, but also in the context of other and different product distribution transactions that are faced by electrical manufacturers, distributors and their customers. *Amicus* urges the Court to reverse the judgment of the Eighth Circuit Court of Appeals in this case.

IMPACT OF CASE ON DISTRIBUTION OF ELECTRICAL PRODUCTS

The electrical products whose distribution is potentially impacted by the ruling in this case are those products that are sold for use in building construction and renovation projects, the construction of new manufacturing plant or industrial equipment, the overhaul, upgrade, and expansion of manufacturing plant and equipment, and the construction of new or the overhaul, upgrade, and expansion of electric and other utility generation and transmission facilities. Collectively, these are recognized as project transactions, typically characterized by a request for bid from a project owner, general contractor, architect, or systems integrator, who is managing the project.

In these project transactions, the electrical manufacturer is solicited by an intermediary—an electrical distributor, an electrical contractor, an original equipment manufacturer (OEM), a systems integrator, a fabricator or "panel shop"—to

provide an off-book price quotation that the intermediary can rely upon in bidding for a contract or subcontract to supply goods and services to the project manager. In addition to the request for a bid or contract to the intermediary, there are two other important characteristics of these project transactions: (1) the electrical manufacturer will not be making sales to two purchasers for the supply of its product to the project, and (2) the intermediary will be providing to the project manager a bundle of goods and services that tend to vary from project to project.

The panel majority of the Eighth Circuit described the general circumstances presented by the *Volvo* case as follows:

> The majority of heavy-duty trucks sold by dealers are manufactured only after a retail customer has solicited and accepted bids from several dealers. During this competitive bidding process, dealers seek concessions from Volvo for a price below the initial wholesale price (80% of the published retail price), which then allows the dealers to offer lower prices to their customers. This is an industry-wide practice. To remain competitive with other truck manufacturers, Volvo does not reveal its method of calculating concessions. The crux of this case is Reeder's claim that Volvo gave other dealers more favorable price concessions than Volvo granted Reeder, which concomitantly reduced Reeder's profits on successful bids and increased the number of Reeder's unsuccessful bids.

Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corporation, 374 F.3d 701, 704 (8th Cir. 2004).

The distribution of many electrical distribution and control products mirrors the "built to order" model of distribution presented by the facts of the *Volvo* case. These may be engineered solutions specific to the project or, like the assembly of a Volvo truck, they are configured products based on a menu of assembling options. As detailed below, however,

the channel for the distribution of electrical products is more complex than the distribution of heavy trucks, and the Eighth Circuit's holdings in *Volvo*, if not reversed, will have a significant impact on these different channel scenarios as well. At the end of a very complex chain of distribution for electrical products used in these myriad projects, special allowances and discounts on a per-end customer basis increases manufacturer output, lowers prices for the end customer, and supports the delivery of value-added services by the reseller. These pro-competitive outcomes are threatened by the Eighth Circuit's *Volvo* decision.

In contrast to the distribution of Volvo trucks, the distribution of many other electrical products sold in competitive bid for contract or supply in project transactions is marked by a greater number of actors who have a role in the selection, marketing, and distribution of products for use in a particular project, and the fact that some products are also maintained in inventory either by the manufacturer or the distributor.[2] Unlike the case before the Court where there is a single class of truck distributor, many electrical manufacturers have multiple classes of reseller-customers who are engaged in project transactions as intermediaries between the electrical manufacturer and the end customer: electrical distributors, electrical contractors, general contractors, and systems integrators. By and large these different types of resellers do not compete with one another because they offer a different bundle of services with the commodities and

[2] To be clear, this brief is not addressing the pricing of electrical products that move through the distribution channel in a manner typically found in a traditional Robinson-Patman Act case. Many electrical products are sold to electrical distributors, electrical contractors, and to retailers such as hardware stores according to established price schedules recognizing appropriate differences in their functional role in the distribution channel. This brief addresses off-book pricing or special pricing allowances provided to enable a reseller to compete for a specific contract on a per-end customer basis.

customers will value those services differently based on the nature of the project;[3] however, because they could, under the Eighth Circuit's *Volvo* ruling be considered competitors for all purposes, the Eighth Circuit's holding in *Volvo* will negatively impact both competition and the end-customer in these project transactions.

For example, a manufacturer, after taking into consideration various factors such as the extent of inter-brand competition expected, any value-added services provided by the reseller to the ultimate customer, the extent of any historical relationships with the reseller's ultimate customer, the extent of future business it might anticipate, its production schedule, and any other unique aspects of the project, quotes a price and is awarded a purchase order for the sale of its product to a systems integrator who is competing for a contract to a construction company or industrial customer. Two months later, that systems integrator, who has either never or only rarely competed with an electrical distributor before, is now in head-to-head competition with one of the manufacturer's electrical distributors to supply the same type of product, but on this second project the systems integrator proposes to supply a competing manufacturer's product. If, in the second sale, after considering all the factors it previ-

[3] To illustrate the variation in services and value a particular intermediary brings to a transaction: a *fabricator or panel shop* will typically fabricate an enclosure and assemble inside the enclosure various components supplied by electrical manufacturers; a *systems integrator* provides electrical engineering services and integrates a variety of manufacturers' industrial automation and control products into a single solution for the end customer; an *OEM* will manufacture a complete machine assembly for a customer, sourcing electrical components from various manufacturers; an *electrical contractor* provides installation services to the project and under some circumstances may order product directly from a manufacturer; an *electrical distributor* sources and delivers electrical product to the project and may provide special warehousing, staging, kitting or subassembly services for the end customer.

ously considered in making a price quote, the manufacturer awards its distributor a price allowance that is greater than the allowance he previously quoted to the systems integrator on a different project two months earlier, the Eighth Circuit panel majority's opinion in this case exposes the manufacturer to a Robinson-Patman Act claim from the systems integrator for charging it a higher price two months earlier. Alternatively, if the manufacturer offers a lower price allowance to the electrical distributor on the second project, the Eighth Circuit panel majority's opinion exposes the manufacturer to a Robinson-Patman Act claim from the distributor regardless of whether the distributor is awarded a supply contract by the ultimate customer. Faced with the legal risk in the Eighth Circuit, the manufacturer's response is to establish a rigid, standardized price structure, stick to it, and to forego considering the unique competitive conditions in bidding on the project transaction.

Resellers of electrical products do represent, market, and distribute more than one manufacturer's products. In this regard, electrical distribution shares some of the characteristics of distribution described in *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604 (4th Cir. 1985), discussed *infra* in greater detail. Nevertheless, many electrical manufacturers do adopt some elements of a *limited distribution model* for their channel to the end customer. In the limited distribution model, manufacturers appoint a limited number of distributors (perhaps only one) to serve a particular customer base and/or geographic market, perhaps on an exclusive basis. Rigid territorial limitations are the exception, however. In the limited distribution model, it is not uncommon for the manufacturers to assign a distributor to an "area of primary responsibility." This system provides flexibility in channel management, enabling a manufacturer to minimize intra-brand conflicts among distributors that lead to inefficiencies in the distribution channel, but at the same time enabling their distributors to compete most effectively

and provide value-added services for their customers who want them. For example, some customers will prefer one distributor over another because of the package of value-added services and the resulting efficiencies being offered to them by the distributor.[4] Distributors, particularly those that have built strong relationships with their customers and the establishment of efficiencies in the process of serving those customers, will, from time to time, follow their more mobile customers outside of their primary area of responsibility and into a territory that is another distributor's primary area of responsibility as those customers expand nationally. The Eighth Circuit's holdings in *Volvo* threatens channel management flexibility that can serve the interest of ultimate customer: manufacturers will be forced to consider less flexible vertical restraints such as rigid restrictions on territories or customer types in order to avoid their distributors being considered competing purchasers in circumstances where they are not really competing.

Some electrical manufacturers adopt the *saturation model of distribution*, which involves multiple distributors serving a common customer base and/or geographic market on a non-exclusive basis. By its nature, the saturation model of distribution can involve significant intra-brand and inter-brand competition at the reseller level. Saturation distribution can be beneficial for both the distributor and their customers because it ensures availability of stock. To differentiate themselves from other resellers in these circumstances, distributors distinguish themselves with various services that their customers may value differently. Where intra-brand competition among resellers is present, the Robinson-Patman

[4] Such efficiencies are created in the form of value-added services and include local dedicated/customized inventory, dedicated delivery trucks, special payment terms, staging product for a project, kitting product or assembling a sub-assembly for a customer.

Act restrains a manufacturer's ability to charge different prices to functionally equivalent customers.

In both models of distribution, competition is intense for a project transaction because of the winner-take-all outcome. In that respect, it is very different from normal retail or wholesale competition where the competitor can try again to win the customer the following day or week on a subsequent sale to the same customer. Bidders for project transactions act opportunistically and strategically. Those manufacturers who, at a given moment, have excess capacity tend to bid more aggressively, and this translates into more output and lower prices for customers. Under the Eighth Circuit panel majority's opinion, the manufacturer will not be able to make incremental pricing decisions in the specific competitive bid context without having to roll that price allowance out to many other customers, past and future, who are not even competing for that project, but may have some distant competitive relationship elsewhere with the distributor who has solicited the manufacturer's special pricing allowance for the project. The inability of electrical manufacturers to consider each project transaction as a unique marketplace because of the risk of Robinson-Patman Act liability will have detrimental consequences for distributors and consumer welfare.

Resulting price rigidity would also act to eliminate the efficiencies and incentives of having electrical resellers act as "market makers" for their represented products and provide value-added services. The Eighth Circuit's decision, which will force manufacturers to offer uniform allowances based on how they priced in the past or how they anticipate they might have to price in the near future, will not allow the reseller to differentiate itself in the mind of its customer on the basis of price. Where customers seek out price competition through competitive bidding and contracting, as they do in sourcing electrical products, those customers will seek

to deal directly with manufacturers to avoid the impact of the Eighth Circuit's decision, trading off the services that make the sale and distribution of products more efficient for the better price. The reseller is then at risk for becoming little more than a logistics handler rather than the source of important services and serving as a market maker for the manufacturer's products.

Price rigidity will also reinforce incumbency in some contexts resulting in more stable market structures because the procompetitive opportunistic and strategic behavior described above will be restrained. There is a significant amount of replacement business in the electrical distribution and control market, and the incumbent supplier of the equipment to a particular customer typically enjoys a competitive advantage in the replacement and upgrade business. Price therefore becomes a key competitive factor when a bidder is trying to unseat its competitor for the supply of replacement components and upgrades. That competitive factor will be muted if the Eighth Circuit's judgment is sustained.

Although the distribution of electrical products is complex, members of *amicus* have developed legal compliance programs for the distribution of their products, including compliance with the Robinson-Patman Act. One of the tenets of these compliance programs is that if two or more of a given manufacturer's resellers are bidding to supply their products to the same project transaction, all other things equal, they will offer the same pricing allowance to each reseller.[5] On the other hand, each competitive project for which a bid is solicited is recognized as a unique competitive

[5] The panel majority's description of this case quoted above contained the following significant remark: "To remain competitive with other truck manufacturers, Volvo does not reveal its method of calculating concessions." This is true as well for electrical manufacturers bidding to have their products selected for project transactions.

event. The Eighth Circuit panel majority's opinion mars the traditional definitions and understandings of what constitutes local competition between resellers carrying the same brand. The manufacturer will now have to assume that all of its distributors are now potential competitors of each other (even though in practice they are not).

SUMMARY OF ARGUMENT

In construing the Robinson-Patman Act, the judiciary has developed judicial "screens" to distinguish price differences that do not present a reasonable possibility that competition may be lessened from those that might. Thus, before an inference of anticompetitive effect can be drawn, courts have consistently required that discriminations be substantial and durable over time. Similarly, the text of the Act itself contains terms, which are at issue in this case, that operate to the same effect. The Act's requirement that discriminations in price must occur "between different purchasers" of commodities of like grade and quality effectively recognizes that a sale at one price and a mere offer to sell at a higher price cannot lead to a diversion of sales among competitors likely to lead to the "larger general injury" to competition. Similarly, the textual requirement in the RP Act that a discrimination in price injure, destroy or prevent competition with a person who "receives the benefit of" a discriminatory price, recognizes there must be a diversion of sales from a seller's disfavored customer to the seller's favored customer as a result of the price difference; absent that type of diversion, the courts are not dealing with injury to competition, but the consequences of competition itself.

The Court should avoid, as it has avoided in the past, a liberal construction of statutory terms in the RP Act that will invite speculation by finders of fact about an injury to competition that is no more than an "*un*reasonable possibility" or invites behavior by product sellers that is inconsistent with "the broader policies of the antitrust laws." The

Eighth Circuit's holdings erroneously invite impermissible speculation and judgments inconsistent with the other antitrust laws. To correct the legal error in the panel majority's opinion in this case, this Court should (a) adopt Judge Hansen's view that competitive bidding and quoting for contracts and projects creates a "unique marketplace" that is different than the typical RP Act case, see note 10 *infra*;[6] (b) hold that competition is only injured or prevented under the RP Act if, as a result of the price difference, there is a diversion of sales from the disfavored purchaser to a person who "received the benefit of" a lower price (or customers of them); and (c) hold that in a secondary-line injury case, a plaintiff cannot claim it was competitively injured if it did not make a purchase for resale in head-to-head competition, competing for the same dollar, with a person who received the benefit of a lower price.

ARGUMENT

I. THE RP ACT SHOULD BE CONSTRUED IN A MANNER THAT REFLECTS THE INTENT OF CONGRESS AND THE BROADER POLICIES OF THE ANTITRUST LAWS TO PROMOTE COMPETITION

The 1936 Robinson-Patman Act amendment to Section 2 of the Clayton Act, 15 U.S.C. § 13(a), proscribing discriminations in price where the effect is "to injure, destroy or

[6] We do not understand Judge Hansen to be saying that each transaction is a "relevant market" for antitrust purposes. We understand the phrase "unique marketplace" in the context of the competitive bid transaction merely recognizes that Section 2(a) of the RP Act regulates discriminatory pricing in an *intra-brand* setting between customers of the same seller and that intra-brand competition among resellers in this unique marketplace will be the exception. The "relevant market" concept appropriately focuses on pricing behavior in an *inter-brand* or inter-product setting.

prevent competition" departed slightly from the antitrust laws' historic focus on the consequences of monopoly and cartel practices that mimic monopoly or tend to create a monopoly. Historically, the antitrust laws, including the Sherman Act and the Clayton Act, were recognized by Congress to protect the public at large, specifically consumers, from a "larger general injury" to competition, widely understood to mean higher prices, reduced quality, and reduced output in the supply of goods. H. Hovenkamp, Antitrust Law ¶ 103 (2nd ed. 2000).

The Clayton Act, enacted in 1914 and aimed at proscribing certain competitive practices that Congress believed could lead to monopoly, required proof that the discriminatory price, the exclusive contract, or the acquisition of another business "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." In the Robinson-Patman Act, Congress added something slightly different to the calculus of competitive injury in the case of those who do not receive the same price from the same supplier. A cause of action is also available if the effect of the discrimination in price is "to injure, destroy, or prevent *competition* with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. §13(a)(emphasis supplied).

As originally introduced in 1935, the Patman bill, which evolved to become the Robinson-Patman Act, contained no requirement that price differences cause injury to competition. H.R. 8442, 74th Cong., 1st Sess. (1935). The House Judiciary Committee held hearings on the Patman bill in 1935. *To Amend the Clayton Act: Hearings on H.R. 8442, 4995 and H.R. 5062 Before the House Committee on Judiciary*, 74th Cong., 2nd Sess. (1936) ("House Hearings"). While the hearings were underway, the Federal Trade Commission released its Final Report on its Chain Store Investigation, S. Rep. No. 4, 74th Cong. 1st Sess. (1935)

("Final FTC Report"). The Final FTC Report described data gathered by the FTC in its investigation of chain store practices, including the extent of preferences granted to chain stores, the growth of chain stores, the complaints of manufacturers, and advertising allowances granted to chain stores that were not used for advertising. House Hearings at 206. Notably, however, the Final FTC Report concluded that competition among chains and independents rendered the possibility of monopoly in retail distribution remote. Final FTC Report at 19. The most the FTC could say in its Final Report was that "should the trend of the past 20 years and particularly of the last decade continue for a like period we shall have a condition *in some of* chain store merchandising that few will dispute is monopolistic." *Id.* at 86. On the final day of the House Judiciary Committee hearings, the Final FTC Report was introduced into the record. House Hearings at 206. That same day, an amendment to the Patman bill was introduced and approved that would integrate the Patman bill's provision respecting price discrimination into the body of Section 2 of the Clayton Act and add the requirement that the discrimination in price was also unlawful if the effect was to "injure, destroy, or prevent competition with any person who . . . receives the benefit of such discrimination," the language now found in 15 U.S.C. §13(a). House Hearings at 251.

The following year, the House passed the amended Patman bill, containing this competitive injury requirement. A bill similar to the amended Patman bill was introduced in the Senate by Senator Robinson in 1936. S. 3154, 74th Cong., 2nd Sess. (1936). In explaining the new competitive injury element, the Senate Report explained that the generalized competitive injury requirement already found in the Clayton Act was "too restrictive," and that the bill now recognized that "only through injury to the competitor victimized by the discrimination can the larger general injury result." S. Rep. No. 1502, 74th Cong., 2nd Sess. 4 (1936). While liberalizing

the proof of competitive injury in secondary-line price discrimination cases, Congress was not abandoning a connection to "the larger general injury" as an element of the cause of action. The House Report responded to criticism that the legislation would "penalize, shackle, and discourage efficiency" as follows:

> In conclusion, your committee wishes to correct some important misapprehensions, and even misrepresentations, that have been broadly urged with regard to the probable effect of this bill. There is nothing in it to penalize, shackle, or discourage efficiency, or to reward inefficiency. There is nothing in it to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions.

H.R. Rep. No 2287, pt. 1, 74th Cong., 2d Sess. 17 (1936).

A. Construing the RP Act To Avoid Conflict With The Antitrust Laws Requires A Realistic Appraisal of Relevant Competitive Facts

Consistent with the House Judiciary's Committee's statement just cited, this Court has recognized in three cases that an interpretation of the RP Act that brings the Act into conflict with the other antitrust laws is to be resolved in favor of the values in the other antitrust laws. In *Automatic Cañteen v. FTC*, 346 US 61, 63 (1953), the Court eschewed enforcement of the RP Act beyond its express prohibitions because the Court concluded that a liberal construction of the act would "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." The potential for conflict was subsequently noted in *United States v. United States Gypsum*, 438 U.S. 422, 450 (1978), and a year later in *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 83 (1979). In the latter two cases, this Court construed either the Sherman Act or the RP Act in a way that did not compel competitors to communicate with one another,

creating a risk of a Sherman Act violation, to verify their competitor's price to a customer in order to determine whether their price would "meet the competition" of the competitor. In the *A&P* case the Court noted:

> In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices. Because of the evils of collusive action, the Court has held that the exchange of price information by competitors violates the Sherman Act. Under the view advanced by the respondent, however, a buyer, to avoid liability, must either refuse a seller's bid or at least inform him that his bid has beaten competition. Such a duty of affirmative disclosure ***would almost inevitably frustrate competitive bidding*** *and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers.*

Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 80 (1979) (emphasis supplied).

Significantly, the inclusion of the term "competition" in Section 2(a) of the RP Act as well as its legislative history establishes that Congress was not federalizing a private tort remedy for injury to a competitor caused by unfair behavior. If Congress had intended otherwise, it would not have amended the Patman bill as it did to include a competitive injury requirement or recognize statutory defenses based on meeting a competitor's price, changing market conditions, or cost differences. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*, 509 U.S. 209, 220 (1993) ("By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition.")[7] Similarly, the specific statutory terms in Section 2(a) of the RP Act now before the Court in this case,

[7] In *Brooke Group*, this Court emphasized that the Robinson-Patman Act, like the other antitrust laws of which it is a part, as "passed for the protection of *competition*, not *competitors*." 509 U.S. at 224.

"different purchasers" and "receives the benefit of" reinforce that conclusion. These terms must be construed in light of the greater public harm that Congress sought to prevent.[8]

This Court's decision in *Morton Salt Co. v. FTC*, 334 U.S. 37 (1948) reviewed the adequacy of evidence needed to support a finding of competitive injury. In that case, the Federal Trade Commission found that Morton Salt granted discounts of 10 to 25 cents per case of salt, depending on volume, to large buyers. The Commission found that Morton's volume discount schedule, for which only four large retail grocery chains qualified for the lowest price, resulted in small retail merchants *purchasing* salt at wholesale at a price higher than the large chain stores *sold* at retail. *In re* Morton Salt, 40 F.T.C. 388 (1945). These discounts effectively prevented price competition in the resale of salt between large and small retailers. This Court found the price differentials were "sufficient in amount to influence their resale price," and the Commission was entitled to infer that these "substantial discriminations over time were a threat to competition." *Morton Salt Co. v. FTC*, 334 U.S. 37, 47 (1948).[9] More recently, however, this Court has endorsed the view that when a plaintiff relies on inferential proof of injury derived from "substantial price discrimination over time," as opposed to direct proof of diverted sales, the inference may be "overcome by evidence breaking the causal connection

[8] Judge Hansen, dissenting below, made essentially the same point, when he wrote, "My concern does not stem from a strict adherence to the two purchase requirement, but rather from my belief that "purchaser status" is inextricably intertwined with the existence of actual competition and the possible threat thereto." 374 F.3d at 718.

[9] The Court was forced, as a matter of practicality, to assume that, if it upheld Morton's pricing, every product in the grocery store would be subject to the same volume discount pricing that Morton charged for salt, and it therefore had to consider this broader impact on all grocery products in the store in considering the impact on competition. 334 U.S. at 49.

between a price differential and lost sales." *Falls City Industries v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983). See e.g., *J. Truett Payne v. Chrysler Motors, Inc.*, 670 F.2d 575, 581 (5th Cir. 1982).

The Court in *Morton Salt* indicated the inclusion of the new competitive injury language in Section 2(a) represented a change from the Clayton Act's requirement for proof of harm to competition in "secondary-line" injury cases under the Act. The Clayton Act required proof that a proscribed practice "would *probably* have the defined effect on competition," whereas the Robinson-Patman Act only required a "reasonable *possibility*" that such an effect will flow from a price discrimination. *Federal Trade Commission v. Morton Salt*, 334 U.S. 37, 46-47 & n.14 (1948). Accord, *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983). If the distinction between possibilities and probabilities reflects the policy choice made by the Congress in 1936, then it reflects that the legislature was willing to indulge in a greater degree of speculation about the tendency of a practice to lead to monopoly. It follows, however, that if this degree of speculation is permitted, the Court should avoid, as it has avoided in the past, a liberal construction of other terms in the RP Act that will invite speculation by finders of fact about an injury to competition that is no more than an "*un*reasonable possibility" or invites behavior by product sellers that is inconsistent with "the broader policies of the antitrust laws." *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 & n.13 (1979).

The concept of competitive injury recognized in Section 2(a) of the RP Act is that a horizontal diversion of sales over time, from a disfavored purchaser to a competing purchaser who "receives the benefit of" a substantial discrimination in price, can lead to the same kind of injury to competition that the other antitrust laws were designed to prevent. It is the horizontal diversion of sales between competitors selling the

same manufacturer's product of like grade and quality, caused by a substantial discrimination in price over time that is fundamental to the construction of the RP Act and to its harmonization with the Clayton Act, which it amended, as well as the Sherman Act. The key for the judiciary is to be able to identify those circumstances where a diversion of sales caused by a discrimination in price could lead to an injury to competition of the magnitude that the Sherman Act and the Clayton Act proscribed.

Lower courts have uniformly recognized there can be a price difference that is both significant and relatively durable that will trigger the *Morton Salt* inference, subject to "breaking the chain of causation" recognized by the Court in *Falls City*. See generally Hovenkamp, Antitrust Law ¶ 2333c (1999) ("Discriminations of very low magnitude or short duration are typically rejected under a *de minimis* rule." (citing cases)). These judicially developed "screens" sort out potentially illegal price differences from those that are not illegal, because it is generally understood that discriminations of low magnitude or short duration cannot lead to a diversion of sales likely to lead to the "larger general injury" to competition contemplated by the antitrust laws.

The text of the RP Act includes several legislative "screens" to the same effect. The Act's requirement that discriminations in price must occur "between different purchasers" of commodities of like grade and quality effectively recognizes that a sale at one price and a mere offer to sell at a higher price cannot lead to a diversion of sales among competitors likely to lead to the "larger general injury" to competition. Except for the Eighth Circuit's decision in this case, lower courts have uniformly recognized this. See e.g., *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604, 615 (4th Cir. 1984); *M.C. Manufacturing Company, Inc.*, 517 F.2d 1059, 1066-67 (5th Cir. 1975). Similarly, the textual requirement in the RP Act that a

discrimination in price injure, destroy or prevent competition with a person who "receives the benefit of" a discriminatory price, recognizes there must be a diversion of sales from a seller's disfavored customer to the seller's favored customer as a result of the price difference; absent that type of diversion, the courts are not dealing with injury to competition, but the consequences of competition itself. Lower courts have held that a plaintiff must prove that the price discrimination adversely affected head-to-head competition in sales of the defendant's products between the disfavored and favored purchasers. See e.g., *Perkasie Industries Corp. v. Advance Transformer, Inc.*, 1992-2 Trade Cas. (CCH) ¶ 70,046 (E.D. Pa. 1992), *aff'd*, 19 F.3d 644 (3rd Cir. 1994).

The court of appeals below failed to apply this Court's prior guidance in *Automatic Canteen* on the construction of the RP Act:

> Since precision of expression is not an outstanding characteristic of the Robinson-Patman Act, exact formulation of the issue before us is necessary to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings. Familiar but loose language affords too ready a temptation for comprehensive but loose construction. We therefore think it is imperative in this case to confine ourselves as much as possible to what is in dispute here.

Automatic Canteen Company v. FTC, 346 U.S. 61, 65 (1952). In a like vein, the Court has cautioned:

> In appraising the effect of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis.

FTC v. Sun Oil Co., 371 U.S. 505, 527 (1963).

B. The Court of Appeals Failed to Conduct A Realistic Appraisal of Relevant Competitive Facts in This Case And the Consequence is an Outcome That Harms Competition

The court of appeals failed to conduct a realistic appraisal of relevant competitive facts relating to competition for contracts and bid solicitations and how that competition differs from general retail or wholesale competition.[10] The "competition" protected by the antitrust laws, including the Robinson-Patman Act, is "determined by a careful analysis of each party's customers. Only if the they are each directly after the same dollar are they competing." *M.C. Manufacturing Company, Inc.*, 517 F.2d 1059, 1068 & n.20 (5th Cir. 1975) (firms competing for different bid contracts were in a "separate distinct market" from each other). Accord, *DeLong Equipment Company v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1202 (11th Cir. 1993) (competition requirement satisfied only after showing that "BCS and DeLong were after the same Pratt dollar"). This Court's decisions under the RP Act recognize no exception. See e.g., *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437 (1982)("the lower retail prices in Henderson County attracted Indiana customers away from Indiana retailers, thereby causing the retailers to curtail

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[10] This is the view of Judge Hansen, dissenting below. *Reeder-Simco GMC, Inc. v. Volvo-GM Heavy Truck Corporation*, 374 F.3d 701, 718 (8th Cir. 2004):

> Traditional RPA cases involve sellers and purchasers that carry inventory or deal in fungible goods. By contrast, the parties in this case operate in a unique marketplace where special-order products are sold to individual, pre-identified customers only after competitive bidding. By its very nature, this process will never produce the kind of competition the RPA was designed to protect because it will never result in the type of two-purchase transaction that itself creates a market for the goods that are sold . . . It is the nature of competitive bidding, not price discrimination, that makes it so.

purchases from Vanco"); *FTC v. Sun Oil Co.*, 371 U.S. 505, 518 (1963)("certain of the dealers were able to identify customers, who, apparently retaining a preference for Sun products, shifted their patronage from the competing Sun stations to McLean"); *Corn Products Rfg. Co. v. FTC*, 324 U.S. 726, 739 (1945)(differentials were "enough to divert business from one manufacturer to another").

The Fourth Circuit's opinion in *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604, 607 (4th Cir. 1985) reveals the kind of "realistic appraisal of relevant competitive facts" that is important in cases such as this.

> Commercial grade carpet, on the other hand, is generally sold through a competitive bidding process. Dealers in the commercial carpet market must engage in intensive sales work with architects, contractors, and purchasing agents in order to persuade them to specify of accept Lees carpet for a particular bid. While the Lees sales representative for the territory does some of this work, Lees relies to a great extent on its commercial dealers. Personal contacts, quality of installation, and reliability of service are much more important in the commercial market than in the residential market* * *
>
> The giving of such incentives is necessitated by the nature of the carpet industry. Carpet dealers, including both Terry's and Eatman's are normally authorized dealers for a number of manufacturers. The products of these numerous manufacturers are often interchangeable, and the purchaser of the carpet does not usually specify that only one brand may be used. Some incentive is necessary, therefore, to encourage a particular dealer to promote and bid one manufacturer's product over that of another manufacturer. Thus, Lees' marketing strategy is to choose those of its dealers that it believes will be most effective in marketing its products and to give those dealers a price discount to encourage them to promote and bid Lees carpet.

Lees Carpet principally recognized the plaintiff, Terry's Floor Fashions, as its dealer in the residential carpet market, but it did not designate Terry's one of its "major commercial dealers" that would entitle Terry's to receive price incentives for commercial carpet in competitive bidding situations. Lees did sell Terry's small amounts of commercial carpet at list price for negotiated jobs that did not involve competitive bidding. The Fourth Circuit affirmed the dismissal of the Robinson-Patman Act claim, because the Complaint alleged only that Lees sold to its "major commercial dealer" at lower prices than Lees quoted to Terry's for similar carpet. "Terry's had not shown, or even alleged, two comparable, completed sales and had therefore not satisfied one of the jurisdictional prerequisites for establishing a violation of Section 2(a)." *Id.* at 615.

Terry and Lees' "major commercial dealer" were both suppliers of Lees' commercial carpet. In this simplistic sense, one could say that the two dealers were in actual competition with each other. Furthermore, both dealers competed head-to-head for competitive bids in the commercial carpet market *but with different manufacturer's brands of commercial carpet*. What they did not do was to compete head-to-head in the sale of Lees' commercial carpet in competitive bids, and the Fourth Circuit correctly recognized that a Robinson-Patman Act claim was not presented by Lees' refusal to offer Terry's a discount on commercial carpet in competitive bidding situations. The Eighth Circuit's holding, that two dealers who both supply the same supplier's product in the same or sufficiently nearby geographic areas but do not divert sales from one another for the same supplier's product, are in competition with one another for RP Act purposes, would require Lees to change its distribution and pricing practices in a way that is likely to be less competitive and less efficient than the distribution system it established. Equally important, if the Eighth Circuit's holding had been applied in *Terry's*, the inference that the discrimination might injure or prevent

competition between Lees' two customers, which competition never really existed in the first place, and might "possibly" lead the market toward monopoly would be patently unreasonable.

In the case now before the Court, the plaintiff presented evidence of seven instances between 1996 and 1998 where it bid on contracts to supply Volvo trucks in order to show that it was competitively injured. In four of these seven instances, plaintiff *won the contract* in circumstances where plaintiff was *not* competing against another dealer bidding to supply Volvo trucks. Volvo provided plaintiff with a discount for each of these bids. The court of appeals held, despite the fact that there was no diversion of sales between a favored and disfavored purchaser of Volvo trucks, that plaintiff could claim he was less profitable on these sales than he should have been and this reduced profitability constituted an "injury to competition" for which plaintiff could recover damages under the RP Act. The basis for plaintiff's reduced profitability claim was that Volvo Trucks had granted other Volvo dealers who bid on different contracts for different customers in different States (against whom plaintiff did not compete for the contract), either months before or months after the plaintiff had prevailed on its bids, a greater discount than it had granted to plaintiff on the bids where plaintiff prevailed. In so ruling, the court of appeals ignored the statutory text that the effect of the price discrimination must be to "injure, destroy, or prevent competition with any person who . . . *receives the benefit of* such discrimination."

For manufacturers of electrical products, and likely many other manufacturers collaborating with their distributors to represent successfully their products on special construction projects or contracts, the Eighth Circuit's holding puts them in a competitive quandary that has ominous consequences for price competition. Different projects or contracts will present different advantages, disadvantages, and competitive opportunities for the manufacturer's products as well as the services to be offered by the reseller. These differing circumstances can affect the pricing allowances a manufacturer is willing to consider in bidding for a contract to see that its products are sold to its distributor's customer. Under the Eighth Circuit's holding, the manufacturer must, when offering a special allowance in February in one competitive bid transaction, consider whether it will be compelled by the threat of treble damage liability under the RP Act to offer the same discount *in a very different competitive bid situation in later months*, thereby chilling an incentive to offer a deeper discount in February. Alternatively, the manufacturer must consider that in offering a deeper discount in February in one competitive situation, whether it is restricted by the threat of treble damage liability under the RP Act to quote a smaller discount equal to one it granted *in a very different competitive bid situation months earlier*, thereby chilling an incentive to offer the deeper discount in February. Taking into account the risk of treble damage liability in these situations will lead to greater price rigidity. Faced with having to offer the same concession in different competitive bids, the manufacturer may be forced "blend" its assessment of the prospects for success in past or future bids and establish a uniform price allowance. This could force the manufacturer to offer no concession at all or a uniform concession that is less than it would offer in some cases and higher than what it would offer in other cases, potentially resulting in no sales rather than even one sale. Forcing the manufacturer to take into account the risk of treble damage liability in these individual bid competitions will lead to price rigidity and stability, and it will increase the likelihood of more stable market structures.[11]

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[11] In his treatise, Professor Hovenkamp notes that the RP Act "performs a little like the 'most favored nation' clause; it makes a selective price cut more expensive by requiring that the cut be given to

The same risk of stable prices and market structures is presented by the Eighth Circuit's holding with respect to two of the other three competitive bid situations for which plaintiff presented evidence in this case. In one of these situations, the plaintiff *failed to win the contract to supply Volvo trucks* where it was likewise not competing against another dealer bidding to supply Volvo trucks. In the second situation, plaintiff and another Volvo dealer both lost the sale to a non-Volvo dealer.[12] As in the case of the plaintiff's four successful bids, the court of appeals held, despite the fact that plaintiff did not "purchase" Volvo trucks and there was no diversion of sales between a favored and disfavored purchaser of Volvo trucks, that plaintiff could claim it lost the sales and profits on these sales and the lost sales and profits constituted an "injury to competition" for which plaintiff could recover damages under the RP Act.

Finally, the plaintiff was allowed to recover damages in one instance where it was in head-to-head competition with another Volvo dealer, Southwest, for a contract to supply Hiland Dairy. Both Volvo dealers were quoted the same discount by Volvo, bid the same price to Hiland Dairy, and the other dealer was selected for reasons having nothing to do with price. *Reeder-Simco GMC, Inc. v. Volvo-GM Heavy Truck Corporation*, 374 F.3d 701, 720 (8th Cir. 2004) (Hansen, J., dissenting) (a further price concession was offered to the successful Volvo dealer only *after* it had been selected by Hiland in order to accommodate a post-bid request from Hiland). Not only is the plaintiff not a purchaser

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other customers as well. . . .Faced with this situation, the firm will likely refrain from making the cut at all, with the result that the oligopoly is maintained." H.Hovenkamp, *Antitrust Law* ¶ 2340b1 (1999).

[12] The "Tommy Davidson" transaction did involve head-to-head competition between two Volvo dealers, but Davidson ultimately purchased Freightliner, not Volvo trucks. There was no purchase of Volvo trucks from anyone in this transaction.

in this situation, but given Volvo's policy of offering the same discount to Volvo dealers in head-to-head competition for the same end-customer, there is no indication that the additional discount offered to Southwest was not "functionally available" to plaintiff in this case had they requested it in response to Hiland's selection, which either negates the discrimination or causation of injury.[13] See generally, ABA Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Volume I, 106-08 (1980).

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals affirming the judgment of the District Court on the plaintiff's Robinson-Patman Act claim should be reversed.

Respectfully submitted,

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[13] According to Judge Hansen, price discrimination was not the cause of the plaintiff's loss on this sale. Southwest, the other Volvo dealer, was Hiland Dairy's preferred supplier and that is the reason plaintiff did not prevail in the bid. Compare *Valley Products Company, Inc. v. Landmark*, 128 F.3d 398, 403-04 (6th Cir. 1997) (plaintiff's failure to be awarded preferred vendor status was the reason for loss of sales, not the alleged tying agreement); *Hodges v. WSM, Inc.*, 26 F.3d 36 (6th Cir. 1994)(denial of access to defendant's property was reason for loss of business, not the alleged market division).

(13)

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VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this and other federal courts to address the proper scope of the antitrust laws. *See, e.g., Texaco v. Dagher* (Nos. 04-805 and 04-814, petitions filed Dec. 14, 2004); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States Tobacco Co. v. Conwood Co., cert. denied*, 123 S. Ct. 876 (2003); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003). WLF filed a brief *amicus curiae* supporting the petition for certiorari in this case.

WLF is concerned that the decision below would greatly expand the scope of unlawful price discrimination beyond the language of the Robinson-Patman Act, particularly in the context of competitive bidding, and would thereby create unjustified liability on the part of product manufacturers and other buyers and sellers of "commodities" under the Act. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk of the Court.

ARGUMENT

I. Transactions In Which The Plaintiff Makes No Purchase Cannot Satisfy The Act's "Purchaser" Requirement.

The appeals court examined the practice in which Volvo and other truck manufacturers provide discounts on a case-by-case basis to dealers seeking to bid on truck contracts. The court determined that this "industry-standard practice,"[2] Pet. App. 2a, amounted to a violation of the Act where plaintiff alleged that Volvo had offered it a lesser discount (offered a higher wholesale price) than it offered to other dealers involved in different bidding processes for different customers with different requirements. The court conceded that "an unsuccessful bidder is not a purchaser within the meaning of the [Act]." Pet. App. 9a. The court held, however, that losses from plaintiff's unsuccessful bids could nonetheless be a basis of liability and could be incorporated into the damages award. Pet. App. 17a-20a.

The Robinson-Patman Act by its terms indicates that only actual purchasers who have paid a discriminatory price are within the scope of the Act. The Act provides in pertinent part that it is "unlawful . . . to discriminate in price between different *purchasers* of commodities of like grade and quality." 15 U.S.C. § 13(a). The court below erred in holding that non-purchasers, such as the plaintiff here, can obtain money damages under the Act based on bids in which they were unsuccessful and thus led to no purchase.

Except in the four instances where plaintiff allegedly purchased trucks from Volvo at a discriminatory price, the transactions at issue – the losing bids – were outside the scope

[2] *See also Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998) (rejecting similar Robinson-Patman Act challenge to Ford's wholesale truck discounting).

of the Act and were not properly included in a damages award. The fact that plaintiff Reeder-Simco GMC was successful in *some* bids does not enable it to make out a Robinson-Patman Act claim with regard to the larger number of bids at issue that led to no purchase by Reeder-Simco GMC. The truck pricing in the unsuccessful bids simply did not make out the elements of a violation of the Act, and thus plaintiff cannot meet its burden with respect to those bids. "Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969).

II. Sales Lost To Unrelated Third Parties, Rather Than Favored Purchasers of the Seller, Are Not Cognizable Competitive Injuries Under The Act.

To establish a violation of the Act, plaintiff must establish that "the discrimination had a prohibited effect on competition." *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990). The competitive injury cognizable under the Act includes "injury to competition between the favored and the disfavored purchaser" – so-called "secondary-line" injury. *Texaco*, 496 U.S. at 571. The Act applies only where "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a).

At least in the context of competitive bidding, this Court should rule that there is no competitive injury in secondary-line cases unless the favored buyer and disfavored buyer are in actual competition with respect to the same specific customer or customers. The Second Circuit articulated this requirement with regard to secondary-line cases generally in *Best Brands*

Beverage v. Falstaff Brewing Corp., 842 F.2d 578 (2d Cir. 1987). "In order to establish the requisite competitive injury in a secondary-line case, plaintiff must first prove that, as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential." 842 F.2d at 584. The Fifth Circuit has stated that in Robinson-Patman Act cases, "competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." *Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 692 (5th Cir. 2003). *See also Stelwagon Mfg. Co. v. Tarmac Roofing Sys.*, 63 F.3d 1267, 1271 (3d Cir. 1995); *National Distillers & Chem. Corp. v. Brad's Mach. Prods.*, 666 F.2d 492, 496 (11th Cir. 1982).

Here, however, all but two of the instances of price discrimination alleged by Reeder-Simco GMC do not involve competition with another Volvo dealer.[3] In allowing claims based on those offers, the court of appeals rejected a requirement of "direct head-to-head competition" between plaintiff and the dealers who allegedly received more favorable terms. Pet. App. 17a. It determined that sales lost to non-Volvo dealers were also cognizable injuries to competition. Yet the plaintiff in those bids was in competition only with dealers of other brands of trucks, and any lost sales and lost profits were lost to those non-Volvo dealers – not to Volvo dealers granted favorable treatment by Volvo.

III. The Approach of the Appeals Court Would Inhibit Competition By Chilling the Use of Competitive Bidding.

"The Court frequently has recognized that strict enforcement of the anti-price-discrimination provisions of the [Robinson-

[3] The two exceptions identified by the court of appeals – the two occasions when plaintiff was bidding against another Volvo dealer for the same deal – were the plaintiff's bid for the sale of twelve trucks to Hiland Dairy Company and its bid for a five-truck sale to Tommy Davidson. Pet. App. 4a, 11a-12a.

Patman Act] may lead to price rigidity and uniformity in direct conflict with the goals of the [Sherman Act]." *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 178 (1983) (O'Connor, J., dissenting). In the specific context of competitive bidding, the Court has recognized that where possible, the Act should not be interpreted in a manner that would "frustrate competitive bidding" and thereby "lead to anticompetitive results." *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80, 81 (1979).

In the context of competitive bidding, there will always be one or more disappointed bidders. Under the theory of the court below, a disappointed dealer-bidder will always have a cause of action under the Act if the manufacturer has previously offered a larger discount to another dealer in connection with a different bidding process (or if the manufacturer subsequently does so). The practical effect of such a doctrine is to eliminate competitive injury as a distinct requirement, and, ultimately, to deter any variations in discounting. This, in turn, will limit the vigor of competition within the competitive bidding process.

The chilling effect on competition within competitive bidding is magnified because the Act also provides for *buyer* liability. Section 2(f) of the Act makes it unlawful for a buyer "knowingly to induce or receive" a discriminatory price prohibited by the Act. 15 U.S.C. § 13(f); *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 73 (1953). While the requirement of "knowing" inducement or receipt of the discriminatory price provides some protection to buyers in theory, this state-of-mind element is a quintessential jury question, and thus may be cold comfort to buyers whose priority is to stay out of court altogether.

Respondents may object on policy grounds that applying the requirements of the statute leaves some price differentials – such as those alleged here – to the discretion of the seller (except to the extent they may independently violate other statutory restrictions, such as § 1 of the Sherman Act, 15 U.S.C.

§ 1). This simply reflects that the text of the Robinson-Patman Act does not prohibit all instances of price discrimination. "[T]he statute as a practical matter could not, and does not, ban all price differences charged to 'different purchasers of commodities of like grade and quality.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993). The Act is deliberately limited in scope, generally geared toward maintaining fairness in conventional retail-wholesale pricing programs, not toward policing price differentials wherever they may be found. *Cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (Rule 10b-5 suits available only to actual purchasers and sellers of shares, not to those who are misled by defendant's fraud into not purchasing).

This Court has frequently noted that Congress intended for the Act to address the threat to competition posed by preferential treatment accorded to large retailers. "The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers." *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 75-76.

This is far from the only dimension in which the terms of the Act are limited in scope. For example, the Act does not cover transactions involving services, applying by its terms only to "commodities." *See* Mark Klock, *Unconscionability and Price Discrimination*, 69 Tenn. L. Rev. 317, 358-61 (2002). Even where commodities are involved, many types of transactions are excluded by virtue of the statute's requirement of actual sales. "The Act does not apply, for example, to long term leases; to mere offers to sell; to acting as an intermediary between a seller and its customers; or to licensing computer software." Donald S. Clark, *The Robinson-Patman Act: General Principles, Commission Proceedings, and Selected Issues* (June 7, 1995).[4] Nor does it apply to bidders in situations

[4] Available for download at http://www.ftc.gov/speeches/other/patman.htm.

where – as here – they make no purchase or are not in competition with other customers of the same seller.

CONCLUSION

For the foregoing reasons and for the reasons stated by petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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BRIEF OF THE TRUCK MANUFACTURERS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE FARM EQUIPMENT MANUFACTURERS ASSOCIATION, THE ASSOCIATION OF EQUIPMENT MANUFACTURERS, TRUCK TRAILER MANUFACTURERS ASSOCIATION, AND THE BUSINESS AND INSTITUTIONAL FURNITURE MANUFACTURER'S ASSOCIATION INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Letter from R. Hewitt Pate, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., to Deborah A. Garza, Chair, Antitrust Modernization Commission (Jan. 5, 2005), *available at* http://www.usdoj.gov/atr/public/comments/207122.htm 25

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BRIEF OF THE TRUCK MANUFACTURERS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE FARM EQUIPMENT MANUFACTURERS ASSOCIATION, THE ASSOCIATION OF EQUIPMENT MANUFACTURERS, TRUCK TRAILER MANUFACTURERS ASSOCIATION, AND THE BUSINESS AND INSTITUTIONAL FURNITURE MANUFACTURER'S ASSOCIATION INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

"I have difficulty in knowing where we are with this, and I should think the people who are trying to do business would find it much more troublesome than we do, for it does not trouble me more than once a term, but it must trouble them every day."

— Justice Jackson[2]

Amici curiae are interested in this case because the Eighth Circuit's decision threatens to impede substantially their members' ability to engage in interbrand competition by offering price discounts to their resellers.

The Eighth Circuit concluded that manufacturer discounts might violate the Robinson-Patman Act even when given to resellers that are competing only against resellers of other brands. In reaching that conclusion, the Eighth Circuit

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[1] By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

[2] *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), Transcript of Oral Argument, Oct. 9, 1950, p. 88 (as quoted in FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT xi (1962)).

misapplied the Act in a manner that will hinder competition and raise prices to consumers in the truck market involved in this case, as well as in markets for many other types of products sold by *amici*'s members. As explained in the sections that follow, while manufacturers employ the type of discounts at issue to increase *inter*brand competition, those discounts do not lessen *intra*brand competition—and the lessening of such competition is a required element of a Robinson-Patman Act claim based on a manufacturer's prices to its resellers.

The individual interests of *amici curiae* are as follows:

The Truck Manufacturers Association ("TMA") is a not-for-profit corporation whose members include all of the major North American manufacturers of medium-duty and heavy-duty trucks (greater than 19,500 pounds gross vehicle weight rating). TMA's members include Ford Motor Company, Freightliner LLC, General Motors Corporation, International Truck and Engine Corporation, Isuzu Motors America, Inc., Mack Trucks, Inc., PACCAR Inc., and Petitioner, Volvo Trucks North America, Inc. ("Volvo").

National Association of Manufacturers ("NAM") is the United States' largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

The Farm Equipment Manufacturers Association ("FEMA") is a not-for-profit corporation composed of over 650 United States and Canadian companies that are engaged in the manufacture and sale of specialty farm equipment, as well as companies that supply those manufacturers. FEMA operates to enhance the specialty farm equipment manufacturing industry by, among other things, providing industry leadership and business opportunities to its members.

The Association of Equipment Manufacturers ("AEM") is a nonprofit corporation. Its members include the major manufacturers of equipment used worldwide in the construction, agricultural, mining, forestry, and utility industries. AEM members produce a wide variety of equipment, from large earthmovers and agricultural equipment to smaller hand-held, portable and walk-behind machinery designed to handle a wide variety of specialized tasks. Its members also produce components used by these equipment manufacturers, such as engines, transmissions, hydraulic equipment, and electronic controls; as well as provide services to these dynamic industries.

The Truck Trailer Manufacturers Association ("TTMA") is an international trade association composed of manufacturers of truck trailers, tank trailers, cargo containers, cargo tanks for trucks, and container chassis. TTMA's members manufacture over ninety percent of the total annual production of those units in the United States. These manufacturers range in size from those selling over 50,000 units per year to those that sell less than 1000 units. In addition, over 100 of these manufacturers' major material and component suppliers are TTMA associate members. TTMA's purpose is to establish confidence between these manufacturers and their suppliers in order to bring about a mutual understanding of the problems confronting the industry.

The Business and Institutional Furniture Manufacturer's Association International ("BIFMA") is a not-for-profit trade association of furniture manufacturers and suppliers. BIFMA has 260 members, 145 of which are office furniture manufacturers. BIFMA's mission is to serve the North American office, business and institutional furniture manufacturing industry by providing industry information, advocating for the industry's interests, and offering industry-wide trade development opportunities.

Amici's Use of Differential Discounts to Promote Interbrand Competition

1. The market for medium-duty and heavy-duty trucks. Unlike automobiles, medium-duty and heavy-duty trucks are rarely bought "off the lot." Most trucking company purchasers operate fleets, varying from only a few trucks to several thousand. These fleets serve a variety of uses, including over-the-road cargo hauling, and vocational applications, such as construction or logging. By the late 1990s, large purchasers (more than 100 trucks per year) comprised about a third of the market, midsized buyers (ten to ninety-nine trucks a year) just under a quarter, and only the remainder was composed of small purchasers (less than ten a year).[3]

Truck manufacturers aggressively market their products in many ways, including providing their dealers with additional discounts on multiple truck deals to win business away from other manufacturers. Because the manufacturers have comparable product offerings, often the main competitive battle is over price, with the result being that customers obtain lower prices.

Because of the diversity of jobs for which these trucks are used, manufacturers offer a myriad of options for, among other things, engines, transmissions, axles, and cab configurations. Buyers generally purchase trucks "made to order" from dealers who most often maintain close relationships with their customers.[4] Because competition among truck manufacturers is fierce, truck buyers typically approach dealers of several brands before making a purchase. The prospective purchasers provide their specifications to the dealers

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[3] Michael E. Porter & Örjan Sölvell, *Volvo Trucks (A): Penetrating the U.S. Market*, HARV. BUS. SCH. PUB. (Rev. Mar. 31, 2004), *available at* http://www.hbsp.harvard.edu/b02/en/common/item_detail.jhtml?id=702418.

[4] *Id.*

and select the dealer (and its manufacturer) that gives the best terms. The manufacturer then builds its truck "from the ground up."

Manufacturers set the price at which they will sell trucks to their dealers case by case. For each prospective purchase, the dealer works with the potential buyer and finds out as much information as possible about its needs and circumstances. The dealer learns the buyer's specifications, how many trucks it desires, what other brands the buyer is considering, and, when possible, the prices offered by competitors. Dealers also attempt to gather information on other factors that can affect how great a discount the manufacturer will offer to assist in making the sale. Is the buyer, for example, a Volvo owner who might be more inclined to stay with that brand? Is the buyer seriously considering other brands? How price sensitive is the buyer? Is the buyer a "conquest account," meaning a buyer who has historically purchased another brand?

The dealer passes this information on to the manufacturer, which then considers a host of factors to determine whether and how much of an additional discount off the dealer's standard discount the manufacturer will provide. Some of these factors are industry related, e.g., what is the current demand for trucks? Some are manufacturer related, e.g., how busy is the assembly plant? And some are specific to the particular customer, e.g., how many trucks is the customer expected to buy both now and in the future? Does the customer currently use a competing manufacturer's trucks? Has the customer bought the manufacturer's trucks but is thinking of moving to another brand? Considering all of these factors—some of which are more amenable to calculation than others—the manufacturer provides the dealer with an additional discount, variously referred to as a "competitive price allowance" or a "concession." The result of this process is that on many truck deals to which price assistance programs apply, "dealers never know how much to sell a truck

for until they call factory officials to see how much extra concession they'll allow on the deal."[5]

As Volvo demonstrated at trial, this system does not disadvantage its dealers competing for a particular sale because Volvo has a policy of providing the same discount to dealers working with the same potential buyer. JA 80. That policy is common in the industry. *See Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 323 (5th Cir. 1998) (competitive price assistance program managed "to ensure that all Ford dealers bidding the same customer received an equal [competitive price allowance]"). It allows manufacturers to ensure that all their dealers are able to compete with other brands without favoring some of their dealers over others in making a sale to a particular customer. *See id.* (providing dealers on the same bid with the same discount ensured "that all Ford dealers could meet the competition from other original equipment manufacturers").

Thus, a manufacturer's price discount policy has no effect on whether a purchaser decides to buy from any particular dealer of that brand. Instead, the discounts serve only to *reduce* prices of one brand in competition with other brands. They promote *inter*brand price competition—the very type of competition that the antitrust laws principally protect. *See Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977).

2. Manufacturers in other markets also use differential prices to noncompeting resellers to foster interbrand competition. Similar procompetitive differential pricing occurs in many of the other markets in which *amici*'s members participate. Office furniture manufacturers, for example, market their products in the same way as truck manufacturers, using independent resellers that sell to customers through a competitive bidding process that yields unique sales contracts. Agricultural and construction equipment manufacturers, as well as trailer and intermodal container manufacturers, also generally market their products through a network of authorized dealers. These dealers in turn sell to construction companies, equipment rental firms, agricultural companies, government agencies, mining companies, trucking companies, and other end users. Interbrand competition among manufacturers of similar equipment types is intense. As in the truck market, equipment and trailer buyers typically approach dealers of several brands to negotiate the best bid for a unit or for an entire fleet that meets the end user's specifications. Given the general competitive environment or internal factors, such as a manufacturer's marketing objectives, a manufacturer may decide to offer additional price assistance to its dealer (e.g., a greater discount or favorable financing) in order to obtain that buyer's business. Thus, while the size of the manufacturers in these diverse industries varies greatly, they all share a distribution method that has been adversely affected by the court of appeals' erroneous application of the Robinson-Patman Act in this case.

In fact, countless times every day members of the *amici* and other U.S. manufacturers grant additional discounts to independent resellers in order to secure a customer's order in the face of fierce interbrand competition. Through the use of such discounts—one weapon in the rough and tumble competitive battle—customer brand allegiance is switched and new products and product systems are purchased. The ultimate winner in this battle is the customer, who, having played off one manufacturer against another, is able to secure a lower price.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision, in addition to construing the Robinson-Patman Act in a manner that conflicts with decisions of this Court and of other courts of appeals, fails to recognize the economic realities of the world in which manufacturing companies compete. The type of price competition

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[5] Joseph Bohn, *Truck Dealers Assail Floating-Discount Price System*, AUTOMOTIVE NEWS, April 22, 1991, at 22.

that the Eighth Circuit held illegal, i.e., discounts given to independent resellers to obtain a specific consumer's order, are prevalent in numerous industries, are procompetitive, and are consistent with decades of Robinson-Patman Act jurisprudence. Indeed, this Court and other courts of appeals have recognized that the Robinson-Patman Act does not forbid a manufacturer to offer its resellers differential prices if those resellers are not in actual competition for the same customers.

The Eighth Circuit ignored this basic principle. It instead allowed Respondent, one of Volvo's dealers, to recover because Volvo gave other resellers lower prices in connection with customer sales for which Respondent did not compete and could not have made. Under that approach, a manufacturer that offers a lower price to one of its resellers risks a Robinson-Patman Act violation unless it offers the same price to all its resellers—even those that do not compete for the target customer's business. Because of this risk, most manufacturers will need to reexamine their existing pricing programs, and many will have to change those programs. At a minimum, such an undertaking will impose substantial and unnecessary transaction costs, but, more importantly, the programs that manufacturers are likely to adopt to protect themselves against a Robinson-Patman Act claim like Respondent's will tend to yield higher prices or decreased competition. As a result, the Eighth Circuit's application of the Act is directly contrary to this Court's repeated admonition that "'the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) (quoting *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)).

ARGUMENT

I. THE EIGHTH CIRCUIT'S APPLICATION OF THE ROBINSON-PATMAN ACT THREATENS TO IMPAIR PRICE COMPETITION WHEN MANUFACTURERS SELL THROUGH INDEPENDENT RESELLERS.

In affirming the multimillion-dollar damage award in this case, the Eighth Circuit relied almost entirely on discounts Volvo provided in connection with end-user sales for which Respondent, Reeder-Simco GMC, Inc. ("Reeder"), was not competing. Under that approach, a manufacturer may not safely limit its price concession to the competitive circumstances of a particular sale. Instead, whenever a manufacturer considers what price to charge a reseller on a particular deal it must consider the discounts it has made, perhaps up to months earlier, on sales through other dealers to other customers anywhere in the United States.

For example, if a manufacturer elected for competitive reasons to give a discount in connection with a particular bid situation in North Dakota, the Eighth Circuit's decision would arguably require it to give that same discount on all similar trucks sold anywhere in the United States. This result would be compelled even if the manufacturer extended the lower price in North Dakota to fill its order board, capture a high profile fleet, win business away from the manufacturer's competitor, or protect existing business from an aggressively discounting rival.

What is more, at least in the absence of territorial restraints on resale, acceptance of the Eighth Circuit's approach suggests that a plaintiff-reseller can demonstrate harm to competition if a manufacturer fails to give it discounts that are as favorable as those given to other resellers with which the plaintiff did not actually compete. For example, under the Eighth Circuit's application of the Act, a manufacturer exposes itself to Robinson-Patman Act risk if it provides its dealer in Fargo with greater discounts than its dealer in St.

Louis, even if the Fargo reseller's customers would never consider buying from the St. Louis reseller. The Eighth Circuit's reasoning suggests that the St. Louis reseller may state a Robinson-Patman Act claim by alleging—as Reeder did—that if it had only received the more favorable discounts the manufacturer gave the Fargo dealer, it would have lost fewer sales in its locale to dealers of *other brands*, and its profits would also have been greater on the sales it was able to make.

Under this erroneous construction of the Robinson-Patman Act, a manufacturer's only safe course of action is to level all discounts with a higher price. When the manufacturer might otherwise be willing to discount heavily in one instance to try to win business from a rival or keep a factory at profitable usage, the Eighth Circuit's construction of the Act requires it to consider whether it can afford to offer that same discount to dealers everywhere in the country for several months in the future. Unless a manufacturer is prepared to give the same discount to all its resellers—a costly exercise for any manufacturer with a large independent network of resellers—it likely will not give the discount at all.

Professor Hovenkamp has explained this price stabilization effect of restricting selective price discounts in his treatise: "The empirical evidence suggests that when sellers are forbidden from making selective price cuts, they generally respond by making none at all, for giving an across-the-board discount to all buyers is too expensive."[6] "[I]f the market is competitive to begin with," he has noted, an across-the-board price cut "is an unlikely result, for the [manufacturer] will already be operating at only a competitive markup."[7]

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[6] 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2340b1, at 122 (1999); *see also* Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J.L. Econ. & Org. 296 (1994).

[7] 14 HOVENKAMP, *supra*, ¶ 2340c, at 126.

The Department of Justice has reasoned that similar restrictions on differential pricing caused by most-favored-nations clauses are *anti*competitive.[8] It, too, has concluded that sellers may be discouraged from price-cutting if they must make a lower price available to all other customers.

In fact, antitrust scholars have long recognized the price increasing effect of restrictions on selective discounting. As one commentator remarked a half century ago, "experience teaches that those members of an industry most interested in fostering uniformity of prices, preferably at a high level, may find a ready ally in the Patman Act."[9]

Moreover, manufacturers' selective use of differential prices has been shown to be *pro*competitive. As Professor Cooper has explained, "[s]elected price variations may provide the most efficient method of gathering information

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[8] *See, e.g., United States v. Med. Mut., of Ohio*, 1999-1 Trade Cas. (CCH) ¶ 72,465 (N.D. Ohio Jan. 29, 1999) (consent decree barring enforcement of most-favored-nation requirement); *United States v. Delta Dental of Rhode Island*, 1997-2 Trade Cas. (CCH) ¶ 71,860 (D.R.I. July 2, 1997) (consent decree prohibiting enforcement of most-favored-rates requirement); *United States v. Ore. Dental Serv.*, 1995-2 Trade Cas. (CCH) ¶ 71,062 (N.D. Cal. July 14, 1995) (consent decree prohibiting the adoption or enforcement of most-favored-nation clauses); *United States v. Lykes Bros. S.S. Co.*, 60 Fed. Reg. 52,208 (DOJ Oct. 5, 1995) (consent decree barring enforcement of "automatic rate differential clause"). *See also* Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 ANTITRUST L.J. 517, 529–30 (1996); Arnold Celnicker, *A Competitive Analysis of Most Favored Nations Clauses in Contracts Between Health Care Providers and Insurers*, 69 N.C. L. REV. 863, 883–91 (1991) (describing competitive effects of prohibiting price discrimination and comparing effects of Robinson-Patman Act's ban on price discrimination with the anticompetitive effects of most-favored-nations clauses).

[9] Harry L. Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 NW. U. L. REV. 173, 173 (1962); *see generally* O'Brien & Shaffer, *supra*, 10 J.L. ECON. & ORG. 296 (studying welfare effects of secondary-line price discrimination and concluding that forbidding discriminatory discounts results in all retailers paying higher input prices and all retail prices rising).

about demand and thereby improve the opportunities for price competition."[10] Additionally, "[p]rice discrimination may . . . be adopted as one of the most efficient means of competitive promotion. Price reductions may be offered in selected markets or to selected customers for the purpose of inducing experimentation and future sales at nondiscriminatory prices."[11] *Cf. Ball Mem'l Hosp., Inc. v. Mut. Hosp., Inc.*, 784 F.2d 1325, 1340 (7th Cir. 1986) (Easterbrook, J.) (stating that "the control of price discrimination poses substantial risks to competition, which often works through 'discriminatory' chiseling down of prices").

Under the Eighth Circuit's interpretation of the Act, a manufacturer unwilling to abandon selective discounting may have to change its distribution methods substantially to avoid Reeder-like Robinson-Patman Act claims. For example, a manufacturer desiring to continue using selective discounts may be forced to resort to imposing restrictions on where its dealers can sell or eliminating its independent dealer network altogether. While such forms of organization can enhance interbrand competition under certain circumstances, *see Cont'l T.V.*, 433 U.S. at 51–52 (discussing possible efficiencies from vertical territorial restraint), many manufacturers have chosen to sell through independent dealers, presumably calculating that entrepreneurial dealers enhance market penetration in relationship-dominated markets. Many members of the *amici* have decided that they are better able to compete against other manufacturers by allowing potential purchasers to buy from any of their dealers, rather than limiting purchasers to dealers in a particular territory. By allowing the potential purchaser choices among dealers, the manufacturer increases its dealers' incentives to, among other things, market aggressively (including sacrificing their own profit margin to offer lower prices when necessary to capture increased business and build long-term relationships) and to provide superior customer service. The benefits of this competition ultimately inure to the consumer.

[10] Edward H. Cooper, *Price Discrimination and Economic Efficiency*, 75 MICH. L. REV. 962, 975 (1977).

[11] *Id.*

Congress enacted the Robinson-Patman Act in significant part to preserve independent resellers. It would be perverse to extend the Act so broadly that it drives manufacturers to eliminate or substantially curtail those resellers. The Eighth Circuit's affirmance of Reeder's judgment based on sales lost to other manufacturers' dealers has this effect, contrary to both the Act's text and this Court's decisions interpreting it.

II. THE EIGHTH CIRCUIT MISCONSTRUED THE ROBINSON-PATMAN ACT'S COMPETITIVE INJURY REQUIREMENT.

Because the Robinson-Patman Act's prohibitions may be antithetical to the procompetitive aims of the Sherman Act, this Court recognized long ago that the Robinson-Patman Act's reach should not be extended beyond its terms. "[S]implified enforcement of the Act," this Court explained, "might readily extend beyond the prohibitions of the Act, and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953).

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), the section relied on by Reeder, does not require a manufacturer to offer identical prices for its products to each dealer on every occasion. *See Am. Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963). Instead, § 2(a) prohibits a manufacturer from charging different prices to its dealers only when the effect of the price differences "may be *substantially to lessen competition* . . . or prevent competition *with any person who either grants or knowingly receives the benefit of such discrimination*, or with customers of either of them." 15 U.S.C. § 13(a) (emphasis added). Thus, by its terms, § 2(a) requires a substantial lessening of *competition*—either

at the level of the person granting the discriminatory price (the "primary line") or at the level of the person receiving the discriminatory price (the "secondary line").

In a secondary-line claim, like this one, the relevant competition is *among that manufacturer's resellers*. The Robinson-Patman Act's prohibition on secondary-line price discrimination was intended to remedy the perceived injustice when large chain retail stores used their buying power to extract favorable discounts from manufacturers, then lowered their prices to drive their smaller rivals out of business by stealing customers outright or by forcing the small stores to make unprofitable reductions in their own prices. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 49–50 (1948). Competition (in the secondary-line sense) may be harmed because, regardless of how efficient the small rival is, the price discrimination puts it at a competitive disadvantage.

This is the paradigm for a secondary-line § 2(a) violation. The disfavored reseller must compete with the favored reseller for the same retail customers and lose business or profits *because of* the price discrimination. *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir. 1982) (§ 2(a) requires proof that "the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from him, the disfavored competitor"); *Am. Oil*, 325 F.2d at 104 ("Price discrimination which shifts business between competitors in a 'second line' . . . is . . . a matter with which the statute is concerned."). Unless the plaintiff-reseller proves that it competed with the favored purchaser at the time of the purchases, it cannot demonstrate the competitive harm required by § 2(a). Absent head-to-head competition, price discrimination by a manufacturer could not have caused the disfavored reseller to lose sales or lower its profits. *See, e.g., Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1170 (7th Cir. 1978) ("Plaintiff must show that he competes with those customers receiving the favored prices.").

Professor Hovenkamp has explained this point:

> The perceived victims of secondary-line discrimination are the seller's disfavored purchasers, who are also generally the plaintiffs in private, secondary-line actions. The theory of injury is generally that the defendant's lower price sales to the plaintiff's competitor (the favored purchaser) placed the plaintiff at a competitive disadvantage and caused it to lose business. This theory necessarily requires the plaintiff to show that it competes with the favored purchaser.[12]

This fundamental requirement—that the disfavored reseller lost sales or profits to favored resellers as a result of the price differential—was effectively eliminated by the Eighth Circuit's conclusion that Volvo's sales to dealers not competing against Reeder for the same customers nevertheless violated the Act. The court of appeals permitted Reeder to recover merely by showing that another dealer received a better price at some other time, in some other place, and in connection with sales to some other customer. In so doing, the court rewrote the Robinson-Patman Act to prohibit manufacturers from lowering prices in order to compete against other brands, unless they give *all* resellers—even resellers that do not compete for the same customers—the same prices.

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[12] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 14.6c, at 581 (3d ed. 2005).

A. Proving Secondary-Line Competitive Injury Requires That the Favored Reseller Compete With the Disfavored Reseller for the Same Customers.

A disfavored reseller can prove "competitive injury" either directly or indirectly. *See Morton Salt*, 334 U.S. at 49. In either event, however, the injury itself must be of a type to which the Robinson-Patman Act applies—i.e., in a secondary-line case, it must be lost sales or profits *caused by* the manufacturer's charging different prices to competing resellers. *See Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434–35 (1983); *see also Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 421 (8th Cir. 1986) (no nexus demonstrated between the discriminatory price and plaintiff's injury when plaintiff presented no evidence that it "actually lost sales to [a] competing Texaco station" or that it "lowered its prices and decreased its profits in order to compete with any lower price by a Texaco dealer"); *Ag-Chem. Equip. Co. v. Hahn, Inc.*, 480 F.2d 482, 491 (8th Cir. 1973) (§ 2(a) verdict could not stand where "favored" dealer sold to "customers which were completely unavailable to plaintiff").

The direct method of proving competitive injury requires either (i) evidence that customers chose to buy from the favored reseller because its prices were lower as a result of the discriminatory discount, or (ii) proof that, in order to avoid losing sales to the favored reseller, the disfavored reseller lowered its prices and thereby lost profits. *See J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990); *see also Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 385–86 (8th Cir. 1987). *Cf. J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 564–65 n.4 (1981) (reserving the question whether a private § 2(a) secondary-line plaintiff could ever demonstrate antitrust injury without showing that favored purchasers lowered their prices); *ICC v. United States (ex rel. Campbell)*, 289 U.S. 385, 390–91 (1933) (suggesting in ICC rate discrimination

case, that for price discrimination to cause harm, it must result in the preferred producers lowering their prices and either diverting business from the disfavored shipper or requiring the disfavored shipper to lower its prices by reducing its profit margin).

The indirect method of proving competitive injury requires evidence that for a significant amount of time the manufacturer sold goods to the disfavored reseller for substantially more than it sold the same goods to other resellers in direct competition for the same sales. *See Morton Salt*, 334 U.S. at 50. As this Court stated in *Morton Salt*, "competition *may be* adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods *to the competitors of these customers*." *Id.* (emphasis added).

When it applies, this indirect method provides an alternative means of proving the same potential competitive harm as the direct method: the disfavored reseller lost sales or profits because the discriminatory discount enabled a favored reseller to "steal" customers or forced the disfavored reseller to lower prices unprofitably. It is because the indirect method is intended to prove losses caused by the price discrimination that this Court has instructed, "[i]n the absence of direct evidence of displaced sales, this inference [of competitive injury] may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City Indus.*, 460 U.S. at 435.

It would not be sensible to apply the *Morton Salt* inference when there is only the *possibility* of competition, rather than actual competition. When the disfavored reseller does not actually compete head-to-head with a favored rival for the same customers, there can be no causal connection between the price differential and any lost sales or profits. Absent that connection, the price differential cannot harm competition.

B. The Eighth Circuit Erred in Allowing the Respondent to Prevail Without Evidence of Lost Sales to Competing Volvo Dealers.

Because a § 2(a) secondary-line claim only arises when a manufacturer's price differences disadvantage one reseller in competing for customers with other resellers of that brand, the Robinson-Patman Act does not apply when, as here, a disfavored purchaser did not try to compete for the same sales as the favored purchaser. *See M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1066 (5th Cir. 1975); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 585–86 (2d Cir. 1987). Even where the favored and disfavored resellers have the ability to sell to the same customers, the disfavored reseller cannot prevail on a § 2(a) claim unless the discriminatory price *caused* its loss:

> [C]ompetitive detriment on the buyer level presupposes a *causal link* between the seller's prices and the impact on customer competition. If the aggressive resale prices or greater profits of a customer said to jeopardize the competition of his rivals are in fact *causally due* to his more efficient operations or are otherwise not *causally connected* with the seller's price differentials, these cannot logically have the "effect of" wreaking whatever hardships may prevail on the customer level.[13]

Reeder, while having a theoretical ability to sell to the same customers as "favored" Volvo dealers, did not *actually* compete with those dealers for the same sales. The absence of such actual competition precluded the jury from finding (contrary to the Eighth Circuit's erroneous conclusion) that the price discrimination caused harm to competition. While these customers *could have* sought bids from Reeder (which is the basis for the Eighth Circuit's holding that Reeder "competed" with the favored dealers), they (with one exception) never did. As a result, Reeder was never a potential seller to these specific customers. Because the Volvo discounts at issue were specific to particular customer price requests, those discounts could not have caused Reeder lost sales or lost profits.

[13] ROWE, *supra*, at 139.

A manufacturer cannot harm competition among its resellers by quoting different deal-specific prices to resellers marketing to distinct customers. Thus, even were the Robinson-Patman Act otherwise applicable in such circumstances, when a manufacturer's price concessions are offered to respond to concession requests from a potential customer, the manufacturer's prices cannot possibly cause competitive harm if the manufacturer offers the same price to all resellers bidding for *that* customer's business. The same rationale applies if the potential customer approaches only *one* of the manufacturer's resellers. In either competitive bidding scenario, no reseller loses sales or profits because the manufacturer favored another reseller with lower priced products.

In fact, before the Eighth Circuit's decision in this case, commentators have generally presumed that "competitive bidding is not subject to the price discrimination proscriptions of the Robinson-Patman Act, since it generally does not result in competitive injury." Neal R. Stoll, *The Paradox of Value: Price Discrimination Under Section 2(a) of the Robinson-Patman Act*, 740 PLI/CORP 169, at 206 (1991).[14] Secondary-line competitive injury requires *actual* competition between the favored and disfavored resellers under circumstances in which the favored reseller derives an advantage from the favorable price it obtained from the manufacturer.

[14] Competitive bidding is also not properly within the purview of § 2(a) because, as Petitioner explains, *see* Pet. Br. at 27–30, such bidding does not meet § 2(a)'s two-purchase requirement. *See also Cool Insulations, Inc. v. Owens-Corning Fiberglass Corp.*, 68 F. Supp. 2d 763 (W.D. Tex. 1998) (adopting *M.C. Mfg. Co.* view that competitive bidders are not "competing purchasers"); *Hancock Paper Co. v. Champion Int'l Corp.*, 424 F. Supp. 285, 287-89 (E.D. Pa. 1976) (competitive bids are outside §2(a)), *aff'd*, 565 F.2d 151 (3d Cir. 1977) (unpublished table decision).

See Infusion Res., Inc. v. Minimed, Inc., 351 F.3d 688, 692 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2881 (2004) ("plaintiff must first prove that as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential" (internal quotation marks omitted)).[15] In competitive bidding situations involving deal-specific discounts, the only resellers that could be affected by a manufacturer's discount are those from which the customer has requested a bid. Thus, as long as a manufacturer offers the same price to all participating resellers, there can be no secondary-line harm to competition in these situations.

C. The Discounts on Which the Eighth Circuit Relied Are Insufficient as a Matter of Law to Support the § 2(a) Award.

By holding that Volvo's price discounts relating to sales that Reeder *could not have made, and indeed, never tried to make*, caused harm to competition, the Eighth Circuit's decision erroneously extends the Robinson-Patman Act to situations in which a particular manufacturer's resellers do not compete for the same customers.

[15] *See also Olympia Co. v. Celotex Corp.*, 597 F. Supp. 285, 297 (E.D. La. 1984) (previous competition irrelevant if purchasers were not competitors at the time of the purchases), *aff'd on other grounds*, 771 F.2d 888 (5th Cir. 1985).

1. Reeder's § 2(a) claim is not supported by direct evidence: Greater discounts to other resellers in other transactions cannot show competitive harm.

The evidence on which the Eighth Circuit principally relied cannot support Reeder's contention that Volvo's different discounts lessened competition—i.e., impaired Reeder's ability to sell trucks against other Volvo dealers. Indeed, Reeder's sole witness testified that it rarely competed with other Volvo dealers (JA 304–05); its competition admittedly came from other truck manufacturers' dealers (*id.* at 304).

Sales lost to other manufacturers' dealers are not evidence of competitive harm. The Eighth Circuit's decision affirms the § 2(a) award principally based on Reeder's contention that had Volvo offered it trucks at the same prices Volvo sold to favored dealers, Reeder would have sold more vehicles (at the expense of dealers of competing truck manufacturers) and would have had bigger profit margins on those sales. *See* Pet. App. 15a–17a. But the "violation-free" state of affairs is not one in which all dealers get the challenged discounts. *See Rose Confections*, 816 F.2d at 394–95.

Manufacturers put to the choice of lowering all prices or none will likely choose to forgo discounting. The court of appeals erred, therefore, when it accepted Reeder's argument that its Robinson-Patman Act claim could be supported by a contention that it suffered "lost profits" because, had it received the more generous concessions Volvo gave other dealers in connection with other customers, Reeder would have made more sales and increased its profits. But the Robinson-Patman Act does not require Volvo to give Reeder the best possible discount. At most, it may at times require that Volvo give Reeder the same discount as others against which Reeder is competing head-to-head. This requirement, however, does not entitle Reeder to claim "lost profits" by contending that it would have made sales it lost to dealers of

other brands or would have made more profit on sales it actually made. In neither instance does Reeder's claimed loss result from its having been impeded by the discounts in its efforts to compete against other Volvo dealers. *Cf. M.C. Mfg. Co.*, 517 F.2d at 1067 (error not to grant defendant directed verdict on § 2(a) claim when evidence showed that plaintiff's purchasers were for a different contract than other dealers' because "[e]ach contract represented a separate, distinct market").

The lost business on which Reeder relied results from *inter*brand competition—it lost sales because potential customers bought other brands of trucks. This has nothing to do with harm to secondary-line competition under § 2 (a). *Compare Universal-Rundle Corp. v. FTC*, 382 F.2d 285, 287 (7th Cir. 1967), and *Nat'l Distillers & Chem. Corp. v. Brad's Mach. Prods., Inc.*, 666 F.2d 492, 496 (11th Cir. 1982).

The one sale Reeder lost to another Volvo dealer is legally insufficient to show competitive harm and cannot support the entire § 2(a) award. The only evidence that Reeder competed for a sale with a dealer to which Volvo, according to the Eighth Circuit, gave a better discount involves the Hiland Dairy sale. *See* Pet. App. 4a, 16a. Even were the Eighth Circuit's characterization of the Hiland Dairy transaction correct,[16] this one sale alone—twelve trucks out of over 5000 trucks that Reeder claimed it attempted to sell (JA 77–79)—is a legally insufficient basis from which to infer competitive harm. *See Int'l Film Ctr., Inc. v. Graflex, Inc.*, 427 F.2d 334, 336 (3d Cir. 1970) (mere price differential in single isolated transaction did not constitute a Robinson-Patman Act violation); *Am. Oil*, 325 F.2d at 106 (§ 2(a) claim requires "something more than an essentially temporary minimal impact on competition"). And, even if this one sale (for which Reeder claimed lost profits of $30,000) could be the linchpin of Reeder's § 2(a) claim, it cannot support the damages awarded (over $1.3 million before trebling). *See Rose Confections*, 816 F.2d at 395.

[16] Petitioner's brief explains that Volvo initially provided Reeder and the competing Volvo dealer with the same discount in quoting a price to Hiland Dairy. *See* Pet. Br. at 7. Volvo increased the discount, by a mere one percent, only after Hiland Dairy decided to purchase from the other dealer and then demanded a greater discount to compensate for an intervening increase in the base price. *Id.* Under these circumstances, Volvo's increased discount could not have caused harm to competition or to Reeder.

2. The transactions at issue do not support an inference of injury to competition.

The Eighth Circuit's decision also does not identify indirect proof of competitive injury, i.e., evidence from which the jury could permissively *infer* competitive injury, using the approach in *Morton Salt*.

With the exception of Hiland Dairy, Reeder's potential customers did not purchase from other Volvo dealers. And there is little possibility that Reeder lost unidentified customers to other Volvo dealers because they received greater concessions from Volvo. Trucks, unlike, e.g., table salt, are not purchased casually from a corner store. Truck purchasers seek out specific dealers with which they work to determine the individual truck specifications that meet their needs. Only after specifications are chosen and the dealer contacts the manufacturer for a price concession does the dealer propose a price. Thus, it would be incredible to suppose that any unidentified truck purchaser chose a Volvo dealer other than Reeder because it knew—even without requesting Reeder to bid—that the other Volvo dealer would have better prices. The fact that the differences in price concessions (on different deals) were "small," which the Eighth Circuit acknowledged (Pet. App. 17a), only makes it more incredible that those differences caused Reeder to lose unidentified customers to other Volvo dealers.

If a manufacturer's resellers do not actually compete for the same customers, inferring secondary-line competitive harm from the manufacturer's differential discounts is illogi-

cal. Absent actual competition among resellers, a manufacturer's price differential cannot be presumed either to have caused a disfavored reseller to lose sales to the favored reseller or to lose profits by lowering its resale price. Reeder did not show that it actually competed for the same customers as favored Volvo dealers; thus, there is no basis from which to infer this competitive harm.

III. VOLVO'S INTENT TO USE FEWER DEALERS IS IRRELEVANT TO COMPETITIVE INJURY.

In addition to applying an erroneous analytical framework in considering whether there was objective evidence of competitive injury, the Eighth Circuit also erred in relying on Volvo's supposed intent to reduce its dealer numbers as a basis for inferring a lessening of competition. In the course of concluding that the evidence supported a finding of competitive harm, the court noted Volvo's acknowledgment that it had sought to reduce its number of authorized dealers and concluded that "[f]rom this evidence, the jury could properly infer Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices." Pet. App. 16a. This erroneous reliance on "intent" evidence is incompatible with this Court's general antitrust jurisprudence and has potentially harmful ramifications for any manufacturer that decides to reconfigure its distribution network.

While evidence of intent may be relevant to Sherman Act claims when predation is at issue, *see Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985), it has no place in proving a § 2(a) Robinson-Patman Act claim. Section 2(a) claims "must always focus on injury to *competition*." *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 395 (10th Cir. 1985). Evidence of Volvo's intent to eliminate Reeder as a dealer suggests nothing about whether Volvo engaged in price discrimination that caused the necessary harm to competition. Even if Volvo had charged Reeder higher prices in an effort to remove Reeder from the dealer ranks, nothing in the court of appeals' decision suggests that

Reeder's disappearance would have altered the level of competition among Volvo dealers.

More importantly, manufacturers change their distribution networks to increase their ability to compete against other manufacturers. They have nothing to gain by punishing efficient dealers, because they, not their dealers, are the ultimate losers when efficient dealers are lost or inefficient dealers retained. Additionally, as discussed above, selective discounting is often a means by which firms engage in interbrand competition that drives down prices to consumers. Consequently, as in other antitrust areas, a manufacturer's "intent"—either to make changes in its distribution system or to engage in "discriminatory" discounts—is irrelevant to whether particular pricing decisions caused competitive injury. *Cf. NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 138 (1998) (defendant's motive irrelevant to application of the per se rule); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (stating that "intent is not a basis of liability (or a ground for inferring the existence of such a basis) in a predatory pricing case under the Sherman Act").

What is more, by considering Volvo's plans to reduce its dealer force as evidence of competitive harm, the Eighth Circuit's decision creates a risk that changes in distribution schemes and procompetitive price discounting may result in antitrust liability. This poses a serious risk of deterring manufacturers from engaging in competitively beneficial conduct.

* * *

The Robinson-Patman Act has long been criticized. As Assistant Attorney General R. Hewitt Pate, head of the Antitrust Division, recently wrote, "Virtually every antitrust commentator who has examined this Act has concluded that it is inconsistent with effective competition policy and is anti-consumer." Letter from R. Hewitt Pate, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., to Deborah A.

Garza, Chair, Antitrust Modernization Commission (Jan. 5, 2005), *available at* http://www.usdoj.gov/atr/public/comments/207122.htm. *See also* ROBERT H. BORK, THE ANTITRUST PARADOX, 385 (1978) ("The fact is that no other antitrust statute has been subject to so steady a barrage of hostile commentary as the Robinson-Patman Act."). Even if "anticompetitiveness and business inefficiency are built into [the Robinson-Patman Act]," *id.*, the Eighth Circuit's decision, which one commentator has accurately described "as a tortuous journey through § 2(a),"[17] threatens to increase substantially the anticompetitiveness and business inefficiencies in many markets, including those in which *amici* participate. The central flaw in the decision is its focus on the injury to an individual competitor divorced from any injury to competition caused by the price discrimination. As elsewhere in antitrust, injury to competition is the § 2(a) touchstone:

> [I]t is not "injury" *to competitors* but adverse effects on "competition *with*" parties privy to discriminations that the statute expressly forbids. Hence we believe that criteria of competitive effect which focus exclusively on individual competitors' sales or profits rather than the health of the competitive process literally go beyond the terms of the law.[18]

In affirming the treble damages in Reeder's favor, the Eighth Circuit focused exclusively on *Reeder's* sales and profits rather than on whether Volvo engaged in price discrimination that harmed competition among its dealers. This Court should correct this error, which affects how manufacturers across the nation price their products. Rather than allow Robinson-Patman Act claims like Reeder's that "go beyond the terms of the law," this Court should reaffirm that

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[17] WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 1:6 (Nov. 2004).

[18] ROWE, *supra*, at 131–32 (quoting Report of the Attorney General's National Committee to Study the Antitrust Laws 164–65 (1955)).

such claims require harm to *competition*. It should further hold that harm to competition in a secondary-line Robinson-Patman Act case requires, at a minimum, (a) that the plaintiff-reseller actually have competed with the favored reseller for the same end-user sales during the period in which the manufacturer provided the discriminatory discount, and (b) direct or inferential evidence that the plaintiff-reseller lost sales to the favored reseller or incurred lost profits as a result of reducing its resale price to combat the favored reseller's lower price.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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IN THE
Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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May 20, 2005

QUESTIONS PRESENTED

1. Whether Robinson-Patman Act liability may be imposed based on transactions in which the disfavored purchaser and the favored purchaser have not competed for the same business.

2. Whether Robinson-Patman Act liability may be imposed where the seller offers a price to a dealer in a competitive bidding situation and the dealer makes no purchase for that piece of business.

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This brief is submitted on behalf of the American Petroleum Institute ("API") as *Amicus Curiae* in support of the Petitioner.[1]

INTEREST OF AMICUS CURIAE

API, a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry. API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

API members face issues of compliance with the Robinson-Patman Act ("RPA") on a daily basis. Products such as gasoline and lubricants are distributed through networks of dealers and distributors. In establishing prices for customers, API members seek to comply with the provisions of the RPA and frequently seek counsel regarding RPA requirements. API members therefore have an interest in ensuring that judicial guidance in this area is well defined and consistent with the statute. A large number of the RPA cases decided by this Court and others involve the petroleum industry.

API has frequently participated on its industry's behalf in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the RPA. This case presents such issues. API believes that its participation as *amicus curiae* in this case will provide the Court with a broader perspective on the questions presented and will help to highlight the broad

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[1] Pursuant to Rule 37.6, counsel for *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part and no person other than *Amicus Curiae*, its members, and its counsel made a monetary contribution to the brief's preparation or submission.

significance of these questions. Both parties have consented to API's participation, and the letters of consent are being submitted with this brief.

STATEMENT

Petitioner Volvo Trucks North America, Inc. ("Volvo") sells trucks through a system of dealers located throughout the United States. Respondent Reeder-Simco GMC, Inc. ("Reeder") is a Volvo dealer located in Fort Smith, Arkansas. Reeder sued Volvo, alleging price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. §13 ("RPA"). The jury found that Volvo had violated the RPA, and awarded damages. Petitioner's Appendix ("Pet. App.") 6a-7a.

The United States Court of Appeals for the Eighth Circuit affirmed. Pet. App. 1a-32a. The majority held that Reeder had established the elements of an RPA violation. It rejected Volvo's argument that Volvo should not be held liable for price discrimination in competitive bidding situations where Reeder had failed to win the business and thus had made no purchase from Volvo. *Id.* at 10a-11a. The majority also concluded that Volvo could be held liable for price discrimination where Reeder claimed injury in connection with sales in which its competitor for the business purchased trucks from another manufacturer. Among other things, the majority found that Volvo intended to eliminate some dealers like Reeder and held that this constituted antitrust injury. *Id.* at 19a.

Judge Hansen concurred in part and dissented in part, concluding that Reeder had failed to make out a claim under the RPA. In his view, the majority had "attempt[ed] to fit a square peg into a round hole." Pet. App. 27a. Judge Hansen concluded that the RPA does not apply to competitive bidding situations, where there is only a single purchase, and

that there is no RPA violation where there is no injury to competition between Reeder and a favored purchaser. *Id.* at 27a-32a.

SUMMARY OF ARGUMENT

The decision below purports to be a routine application of settled law under the RPA, but it actually marks a broad and unprecedented expansion of that statute's scope. In the most troubling aspect of the opinion, the majority concluded that a seller may be held liable for an RPA violation based on price discrimination that had nothing to do with competition between favored and disfavored purchasers for a particular piece of business. In such transactions, Reeder (Volvo's customer) competed not against another Volvo dealer, but against a dealer who purchased from a different truck manufacturer. Thus, the alleged discrimination did not affect competition between Volvo dealers; the only effect was to reduce Reeder's profits.

The court of appeals' conclusion that such discrimination could form the basis for a finding of RPA liability is inconsistent with settled law. Until the decision below, the law was clear that price discrimination is not actionable under the RPA unless two customers are competing for the same business. If the requirement that the favored and disfavored purchasers compete for the same business is abandoned, serious practical problems will result. Under such an open-ended view of the statute, it would be difficult to counsel companies regarding what pricing conduct is legal and competition would suffer.

There is no basis for this Court to adopt such an interpretation. Neither the language of the RPA nor this Court's precedents support the court of appeals' reading of the statute. Nor does the legislative history support this

interpretation. The Court should reject such an unprecedented expansion of the RPA.

The Court should also reject the court of appeals' conclusion that RPA liability may be imposed where a seller quotes a price to a dealer engaged in competitive bidding and the dealer fails to win the business and thus makes no purchase. The statute is clear that there must be two purchases in order for price discrimination to be actionable. The Court should clarify that there can be no RPA liability in such competitive bidding situations.

ARGUMENT

API members are deeply concerned with RPA compliance and spend substantial time taking steps to ensure that their employees act within the boundaries the courts have established in this area. In devising pricing arrangements, oil companies have relied on settled RPA law. The decision below departs from settled law, abandoning limits on RPA liability that are firmly grounded in the statutory language and judicial precedent.

There is no basis for this departure from settled precedent. The Court should therefore reverse the decision below. In doing so, the Court should make clear that in secondary line cases (1) RPA liability may be imposed only in connection with transactions where the favored and disfavored purchasers have competed for the same business; and (2) RPA liability may not be imposed where the seller quotes a price to a dealer engaged in competitive bidding and the dealer fails to win the business and thus makes no purchase. These conclusions are consistent with the statute, with this Court's precedents, and with congressional intent. Such clear statements of the law would permit advisers to counsel with confidence when addressing pricing practices.

I. RPA LIABILITY SHOULD NOT BE IMPOSED WHERE THE FAVORED AND DISFAVORED DEALERS HAVE NOT COMPETED FOR THE SAME BUSINESS.

A. The Decision Below Departs from Settled Law.

Under the RPA, price discrimination alone is not enough to constitute a violation. There must also be injury to competition.[2] Until the decision below, it was clear that "[p]roving injury to competition at the buyer's level—secondary line injury—requires proof of competition between the favored and disfavored purchasers." I American Bar Association, Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 477 (5th ed. 2002) (citing cases). "Generally, the favored and disfavored customers must be in actual competition in the resale of the seller's commodity for a difference in price to have any likely competitive effect at the buyer level." Harry L. Shniderman & Bingham B. Leverich, PRICE DISCRIMINATION IN PERSPECTIVE § 207.e, at 61 (2d ed. 1987) (discussing possible exception where sales are to different functional levels).

Many courts of appeals have articulated this requirement. For example, in *Best Brands Beverage, Inc. v.*

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[2] Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it unlawful

> to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Falstaff Brewing Corp., 842 F.2d 578 (2d Cir. 1987), the Second Circuit concluded that the wholesaler plaintiff had failed to make out an RPA claim because it did not establish that it had been in actual competition with a wholesaler in another territory. In concluding that the plaintiff had failed to prove the requisite likelihood of competitive injury resulting from the alleged discrimination, the court emphasized that a plaintiff must show that it was "engaged in actual competition with the favored purchaser(s) as of the time of the price differential" (*id.* at 584), and that there must be a showing of "competitive contact" between recipients of the price differential (*id.* at 585).

The Fifth Circuit has been even more explicit. In discussing the required showing of "competitive contact," that court explained that "'[o]nly if [the customers] are each directly after the same dollar are they competing.'" *Infusion Resources, Inc. v. Minimed, Inc.*, 351 F.3d 688, 692-93 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2881 (2004) (quoting *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 (5th Cir. 1975)). In *Infusion Resources*, the court concluded that the distributor had failed to prove an RPA violation, despite its claim that it was competing nationwide with the defendant's other distributors, since it had not shown "actual competition with a favored purchaser at the time of the alleged price discrimination." *Id.* at 693.[3]

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[3] *See also, e.g., M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1068 n.20 (5th Cir. 1975) (under the RPA, "'[c]ompetition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing.'") (quoting *Ag-Chem. Equip. Co. v. Hahn, Inc.*, 350 F.Supp 1044, 1051 (D. Minn. 1972), modified on other grounds, 480 F.2d 482 (8th Cir. 1973)); *Lupia v. Stella d'Oro Biscuit Co.*, 586 F.2d 1163, 1171 (7th Cir. 1978) (plaintiff who claimed he lost sales in town where another distributor had a better (continued...)

Based on these and other decisions, sellers have understood that they generally may compete by offering selective discounts to customers in different geographic regions without fear of liability. They could offer different prices to customers who were bidding on different contracts. With some limitations, they could offer discounts to customers at separate functional levels. In other words, they could compete by discounting selectively so long as the favored and disfavored customers were not competing for the "same dollar."

Were the Court to affirm the decision below, these well-established limits on RPA liability would disappear and competition would suffer. In affirming the judgment of the district court, the court of appeals embraced a reading of the RPA under which a seller may be held liable on the ground that a disfavored purchaser lost sales or profits not to a favored purchaser, but to a dealer that did not purchase from that seller. In the four purchases that Reeder made from Volvo and that the court of appeals cited as a basis for imposing RPA liability, Reeder did not compete with another Volvo dealer for the business. Rather, it competed only with a non-Volvo dealer. Reeder had already successfully bid for the sale to its customer, and Volvo's allegedly discriminatory prices did not cause Reeder to lose that sale—either to another Volvo purchaser, or to anyone else. The only impact of the allegedly higher price that Reeder paid was that it earned less profit than it would have had Volvo offered a lower price.

The court of appeals also cited situations in which Reeder lost sales to a non-Volvo dealer, allegedly because

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discount could not show an RPA violation since he could not show sales he actually lost due to price discrimination).

Reeder did not receive a discount Volvo granted to another Volvo dealer in connection with a different sale. Again, there was no competition between two Volvo dealers for the same business. The two allegedly discriminatory prices were offered in connection with different transactions. In other words, the favored and disfavored Volvo dealers were not competing for the "same dollar."

The practical result of this interpretation of the RPA is to create great uncertainty for sellers. Before the decision below, sellers could be comfortable competing by charging different prices to dealers, so long as it was clear that those dealers were not competitors for the same business. If the decision below were affirmed, however, a seller would face the prospect that pricing will be found to violate the RPA if a plaintiff can show that another dealer received a lower price in a different transaction, even when the two dealers did not compete for the transaction at issue. There would be no clear boundaries to potential liability. Under the court of appeals' view of the statute, a jury could find an RPA violation based on a discount the seller granted to a dealer in a distant location, even if the favored and disfavored dealers never actually pursued business from the same consumer. A seller could no longer rely on identification of separate geographic markets, concluding, *e.g.*, that a selective discount to a dealer hundreds of miles away from other dealers was likely to be lawful. In effect, RPA liability would be open-ended, it would be difficult to provide meaningful guidance that would allow sellers to avoid liability, and competition would suffer.

Our concern about this unwarranted and open-ended expansion of RPA liability is magnified in light of the court of appeals' treatment of the requirement that the defendant's sales to the plaintiff and the favored buyer must be reasonably contemporaneous. In the past, this principle has helped to ensure that RPA liability is confined to situations in which the discrimination actually limits competition between

favored and disfavored purchasers for the same resale business.[4] Here, however, the court of appeals was willing to accept sales that took place months apart as evidence of price discrimination.[5]

This treatment of the evidence reinforces our concern that expansion of the RPA beyond situations in which favored and disfavored purchasers compete for the same business would have a particularly detrimental effect in industries, such as the petroleum industry, where there are

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[4] *See, e.g., Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 389-90 (10th Cir. 1985) (because two purchases were not contemporaneous, plaintiff could not establish that the two purchasers competed with each other); William C. Holmes, ANTITRUST LAW HANDBOOK § 4:3 (2004).

[5] The "evidence" of price discrimination the court cited includes the following: (1) Volvo gave Reeder a 9% concession in March 1998, compared with a 12.3% concession to another dealer in January 1998; (2) Volvo gave Reeder a 19% concession in February 1997, compared with a 21% concession to another dealer in November 1997; (3) Volvo gave Reeder a 24.2% concession in November 1996, compared with a 27.3% concession to another dealer in February 1997; and (4) Volvo gave Reeder a 13.27% concession in February 1996, compared with concessions to other dealers of 18.04%, 15.42%, and 14.53% in, respectively, September 1996, April 1996, and February 1996. *See* Pet. App. 5a-6a. The court found such prices to be discriminatory even though Volvo produced evidence that market conditions changed from month to month. *See id.* at 14a.

If sellers in the petroleum industry must fear RPA liability not only when they charge different prices at the same time, but also when they make sales separated by weeks or months, they will undoubtedly be more reluctant to adjust prices in response to market conditions. *See* 14 Herbert Hovenkamp, ANTITRUST LAW ¶2313a (2d ed. 1999) ("Sudden changes in demand, supply, or costs often affect the market price, sometimes dramatically, and a sale made before such a change occurs should not be paired with a sale made after such a change. To do so would seriously limit sellers' ability to respond to changing market circumstances.").

frequent market fluctuations. Sellers in these businesses must be able to increase and decrease prices to respond to rapid changes in the market, including movements in the cost of inputs and volatility at the retail level. In the gasoline business, for example, sellers face daily (and even more frequent) changes in the price of oil, based on many factors. "In a tight world oil market, even small changes in supply or demand have been known to have a dramatic impact on prices." And "[t]he changes we have seen over the past year – attributable to instability in some key oil producing regions, bad weather and continued high demand – have been far from small."[6]

In order to compete vigorously and successfully, a broker in such a business must respond quickly, adjusting its prices in different geographical areas as conditions change. Likewise, gasoline suppliers must be able to react quickly to localized needs of retailers, who operate in the context of frequent changes to market conditions, including continuous, transparent price adjustments reflected on highly visible price signage. Particularly in view of the court of appeals' willingness to accept sales that took place months apart as evidence of price discrimination, its unprecedented interpretation presents an especially significant threat for sellers that must respond to frequent market changes.

[6] American Petroleum Institute, *FYI on Gasoline* (Apr. 13, 2005), *at* http://api-ec.api.org/filelibrary/FYI%20gasoline%204-13-05.pdf.

B. There Is No Legal Basis for Expansion of RPA Liability Beyond Transactions in Which Favored and Disfavored Purchasers Have Competed for the Same Business.

The reading of the RPA embraced by the court of appeals lacks a basis in the statutory text, this Court's interpretations of the RPA, or the legislative history. Expansion of RPA liability beyond transactions in which favored and disfavored purchasers compete for the same business should be rejected.

1. The Text of the RPA Does Not Support Such an Expansion.

The text of the RPA does not support imposition of liability on a seller based on transactions in which the plaintiff was not competing with a favored purchaser for the same business. The statute makes it illegal to engage in price discrimination "where the effect of such discrimination may be *substantially to lessen competition* or tend to create a monopoly in any line of commerce, or *to injure, destroy, or prevent competition* with any person who either grants or knowingly receives the benefit of such discrimination." 15 U.S.C. § 13(a) (emphasis added).

By its terms, then, the statute requires a harm to competition, not just harm to a purchaser. Where alleged discrimination between two purchasers does not affect any transaction in which they are in competition for the same business, there can be no harm to competition. Moreover, the final clause of the quoted text refers to competition with a person who grants or "receives the benefit of [the] discrimination." On its face, this language does not apply to situations where the favored purchaser was not competing with the plaintiff for a piece of business.

2. This Court's Precedents Do Not Support Such an Expansion.

This Court's prior interpretations of the RPA do not provide support for reading the statute to cover situations in which the favored and disfavored purchasers are not competing for the same business. The Court has previously found violations of the RPA in secondary line cases only when the price discrimination involved purchasers from the same seller who were competing for the same business.[7]

In *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), the Court held that the defendant, a producer of salt, violated the RPA because it offered discounts only to those wholesalers and retailers that purchased a certain quantity of salt. The Court observed that the "quantity discounts on Blue Label and on other table salts were enjoyed by certain wholesalers and retailers *who competed with* other wholesalers and retailers to whom these discounts were refused." *Id.* at 42 (emphasis added). The RPA violation was compounded

[7] In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), a primary line injury case, the plaintiff alleged that the defendant cigarette maker had introduced its own brand of generic cigarettes and had sold them below cost and offered selective rebates to certain wholesalers. The defendant had introduced these price cuts to match the prices of a competitor cigarette maker. The Court held that the defendant was entitled to judgment as a matter of law, emphasizing that "the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition." *Id.* at 220. Indeed, "Congress did not intend to outlaw price differences that result from or further the forces of competition." *Id.* This case – which demonstrates how far a court can stray from the traditional bounds of RPA liability – presents an appropriate occasion for the Court to make similarly clear that a plaintiff in a secondary line injury case must demonstrate that price discrimination has a detrimental effect on competition (not merely on competitors).

because "special allowances were granted certain favored customers *who competed with* other customers to whom they were denied." *Id.* (emphasis added). The Court reiterated that "competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the *competitors of these customers*." *Id.* at 50 (emphasis added).

In *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963), the Court applied the RPA to circumstances in which price discrimination affected competition between purchasers. The defendant gasoline company had offered a price break to one of its retailers so that the retailer could match the price cut of a competitor selling a different brand of gasoline. However, the defendant had not offered an equivalent discount to its other retailers who operated in the same region and competed with the favored retailer for the same business. There was evidence that some of the retailers who did not receive the discount had lost some of their customers to the favored retailer. *Id.* at 510. In holding that the defendant should be held liable under the RPA, the Court highlighted that the injury arose to "the nearby . . . dealers *competing* with [the favored dealer]" as a result of the price concessions. *Id.* at 518 (emphasis added).

The Court in *Sun Oil* warned against defining "competitor" so broadly as to deprive the term of all meaning and deter pro-competitive price discrimination. The defendant had argued that "in order to eliminate the possibility of having even a broad price cut deemed illegal under [the RPA], it would of necessity have to extend the benefits of the concessions to all of its dealers in an unwarrantedly wide geographic area, perhaps nationwide." *Id.* at 526. But the Court reassured the defendant that "[t]he mere existence of a competitive continuum . . . does not require that market limits be indefinitely extended with

absurd results in the form of unwarranted nationwide or otherwise overly broad measures of competitive impact." *Id* at 526-27. Rather, the RPA demands "realistic appraisals of relevant competitive facts" so as not to outlaw selective discounts that have no real effect on intrabrand competition. *Id.* at 527.

Further, in *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the Court considered an RPA claim against a brewery that sold its beer more cheaply to its Kentucky wholesaler than to its Indiana wholesaler. There was evidence that customers living in Indiana purchased beer in Kentucky, so that the two wholesalers competed for the business of the same consumers. *Id.* at 433. The Court applied the "meeting competition" defense and remanded for determination of whether the defendant lowered its price in Kentucky to meet the equally low price of a competitor brewery. Before doing so, however, the Court reiterated that an RPA plaintiff must demonstrate "a reasonable possibility that a price difference may harm competition." *Id.* at 434-35.

In *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990), Texaco sold gasoline to retailers in Spokane, Washington, at its retail tank wagon prices, while granting substantial discounts to two distributors located in Spokane. Both of the distributors supplied gasoline to independent stations located in Spokane and also sold gasoline directly to consumers. *Id.* at 548-49. There was evidence that Texaco executives believed that the dramatic growth of one of the distributors (during a period when the retailers were losing business) was attributable to the magnitude of the discount the distributor received. *Id.* at 551. The Court concluded that the discounts to the distributors constituted illegal price discrimination and that a presumption of adverse effect on competition was appropriate "[t]o the extent that [the distributors] competed with [the retailers] in the retail market." *Id.* at 570.

We are aware of no decision of this Court that even comes close to suggesting that the RPA could be applied to situations in which the favored and disfavored purchasers did not compete for the same business. Rather, this Court's RPA cases point in the opposite direction.[8]

In addition, where favored and disfavored purchasers have not competed for the same business, price discrimination does not result in antitrust injury. An antitrust plaintiff must establish an injury "that flows from that which made defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *see also J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Here it is the difference in price between favored and disfavored purchasers that the RPA makes unlawful. But the injury Reeder allegedly experienced is a loss of profits—a result of the high price it paid, rather than of any difference from the price charged to another Volvo dealer. Reeder also claims to have lost sales, but again any such losses were to non-Volvo dealers; these losses might have resulted from the high purchase price Reeder paid, but

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[8] Moreover, recognizing the benefits of selective discounting, this Court has warned against expansive interpretations of the RPA. More than 25 years ago, the Court commented that "interpretations of the Robinson-Patman Act which extend beyond the prohibitions of the Act" may "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (internal quotations omitted). Among other things, the ability to reduce price selectively spares sellers from the Hobson's choice between price cuts for all and price cuts for none. "The empirical evidence suggests that when sellers are forbidden from making selective price cuts, they generally respond by making none at all, for giving an across-the-board discount to all buyers is too expensive." 14 Hovenkamp ¶ 2340b1. The result is that all consumers end up paying higher prices.

not from any difference in the prices paid by Reeder and another Volvo dealer.

In order to have antitrust injury in a secondary line RPA case, there must be some prospect of diversion of sales involving buyers who are competing with each other. Where two dealers are competing for the "same dollar," the disfavored dealer suffers harm resulting from price discrimination if it loses that dollar of business. But where the disfavored dealer loses a piece of business to a dealer who buys from another seller, its injury does not result from any price discrimination subject to the RPA. That loss has no connection to the alleged violation and, thus, there is no antitrust injury.

The court of appeals, citing Volvo's plan to reduce the overall number of dealers in its distribution system, asserted that "the elimination of some dealers like [Plaintiff] . . . is precisely the type of injury the antitrust laws were meant to prevent." Pet. App. 19a. But we are aware of no evidence in the history of the RPA that Congress intended to constrain the ability of a supplier to limit the size or structure of its distribution network.

In other contexts, this Court has recognized that under the antitrust laws businesses may deal—and refuse to deal—as they see fit. When applying the Sherman Act, the Court has placed "a high value . . . on the right to refuse to deal with other firms." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). The Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *see also Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998)

("The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage.")

In view of the broad recognition of this principle under the Sherman Act, there is no reason to think that Congress would have abandoned it in the RPA by imposing liability where a supplier sought to limit the group of customers to which it would sell, without expressly noting such a change. In fact, Congress expressly provided in the RPA that nothing in the statute "shall prevent persons ... from selecting their own customers in bona fide transactions and not in restraint of trade." 15 U.S.C. § 13(a). [9]

3. The Legislative History Does Not Support Such an Expansion.

Courts that have interpreted the RPA to protect individual competitors—even when competition has not suffered—have typically relied on legislative history.[10] But the RPA's legislative history "has often been misread, or at least overread." 14 Hovenkamp ¶ 2342a. Congress intended the RPA to close loopholes that were interfering with existing antitrust laws, not to advance a new and different set of policies. The House committee report explained that "the antitrust-law legislation has been frequently violated with impunity, and has been inadequately enforced throughout much of the period since its inception; this has resulted in the

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[9] Indeed, it has long been understood that the RPA does not restrict refusals to deal. *See* Frederick M. Rowe, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT §4.1, at 45-48 (1962).

[10] *See, e.g., Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 657 (9th Cir. 1997); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1533 (3d Cir. 1990); *see also Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1158 (D.C. Cir. 1988) (Mikva, J., dissenting).

control of large areas of the industrial field by great combinations and by monopolistic practices having neither legal nor economic justification." H. R. Rep. No. 74-2287, at 5 (1936). The focus was primarily on fostering competition in the marketplace, rather than on the economic health of customers. Congress enacted the RPA "to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting *trade and commerce* against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen." *Id.* at 3 (emphasis added).

But Congress stressed that the antitrust laws' overall purpose—promoting and protecting competition—would be unchanged. The Senate committee report explained that, "[w]hile the bill as now reported closes [some] dangerous loopholes, it leaves the fields of competition free and open to the most efficient ...." S. Rep. No. 74-1502, at 4 (1936). The House committee report instructed that "[t]here is nothing in [the RPA] to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions." H. R. Rep. No. 74-2287, at 17. Instead, the RPA preserved the "unhindered opportunity to demonstrate through efficiency, service, and low prices to the public [the] right to survival in business." *Id.* at 4-5.

When the committee reports did talk about preventing harm to individual competitors, they did so only to acknowledge that harm to competition often arises from harm to competitors. For instance, the Senate report explained that "the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the *larger general injury* result, and to catch the weed in the seed will keep it from

coming to flower." S. Rep. No. 74-1502, at 4 (emphasis added). This and other passages suggest that "Congress's concern was not with injury to . . . competitors for its own sake. Rather, it was because Congress believed that an injury to individual competitors was an essential prerequisite to injury to competitive conditions generally, and it wanted to reach such injury to competitive conditions before it had a chance to mature." 14 Hovenkamp ¶ 2342d.[11] Such history does not support, much less mandate, expansion of the RPA to situations in which favored and disfavored purchasers do not compete for the same business.

II. RPA LIABILITY SHOULD NOT BE IMPOSED WHERE THE POTENTIAL CUSTOMER MAKES NO PURCHASE.

API's members have long relied on another clear and consistent tenet of RPA jurisprudence: the "two-purchaser rule." By its terms, the statute applies only when the seller "discriminate[s] in price between different *purchasers*." 15 U.S.C. § 13(a) (emphasis added). This Court has confirmed the point, explaining that "no single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination." *Bruce's Juices,*

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[11] Moreover, when specifically mentioning harm to competitors, the committee reports referred primarily to harm resulting from large purchasers' coercion of discounts from manufacturers. The House report warned, for instance, that "the evidence is overwhelming that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary." H. R. Rep. No. 74-2287, at 3; *see also Morton Salt*, 334 U.S. at 43 ("The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability.").

Inc. v. American Can Co., 330 U.S. 743, 755 (1947). And for nearly 70 years, the courts have reiterated that

> The discrimination in price . . . must be practiced "between different purchasers". Therefore at least two purchases must have taken place. The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase, as the [plaintiff] contends.

Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 (3d Cir. 1939).

As the instant case illustrates, the two-purchaser requirement has particular application where prospective purchasers have themselves bid for sales to third parties. When multiple dealers are bidding for the business of the same customer, there is—by definition—only one dealer who will win the business and purchase the supplier's product to fulfill that commitment. API members that offer products in competitive bidding situations have relied on the virtually unanimous view of the courts that sales to successful bidders and offers to unsuccessful bidders fall outside the RPA. Until the decision below, "a sale at one price plus either an offer to sell at a higher price or a refusal to sell at any price [was] generally thought not to violate the Act." *Fusco v. Xerox Corp.*, 676 F.2d 332, 335 (8th Cir. 1982).

The court of appeals disregarded this principle. Reeder and another Volvo dealer sought to win a bid from a retail purchaser; Reeder's competitor won the bid; and Reeder alleged that Volvo gave the competitor a better price than it offered to Reeder. Because it had lost the bid, Reeder

never purchased the trucks from Volvo—at best Reeder merely *attempted* to purchase. But according to the court of appeals, because Reeder had purchased from Volvo on other occasions, it constituted a "purchaser" that could claim injury from transactions in which it did not purchase from Volvo. *See* Pet. App. 10a.

This sort of end-run around the RPA's two-purchaser rule contravenes settled law. *See Bay-City Abraham Bros. v. Estee Lauder, Inc.*, 375 F. Supp. 1206, 1218 (S.D.N.Y. 1974) ("[i]n defining a purchaser as referred to in [the RPA] care must be taken to distinguish between a purchaser, and one who is merely a past purchaser or a prospective purchaser"). In the competitive-bidding transactions, moreover, Reeder's alleged injury is not that it was forced to pay too high a price—because there was no sale, it paid no price. Rather, Reeder asserts that Volvo's allegedly discriminatory price *prevented* it from purchasing from Volvo. But the RPA "does not require a seller to create or to maintain a customer relationship with any buyer or prospective buyer." *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 294 (7th Cir. 1974) (Stevens, J.).[12] *Shaw's* itself—the case that set forth the "classic and accepted definition of the term 'purchaser'" (*Estee Lauder*, 375 F. Supp. at 1218)—ruled in favor of a seller who refused even to quote prices to its customer. 105 F.2d at 332.

Disregard of the two-purchaser rule not only expands the scope of RPA liability in a manner that directly contradicts the terms of the statute; it also creates particular

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[12] *See also, e.g., In re Bird & Son*, 25 F.T.C. 548, 553 (1937) (the RPA "does not purport to interfere with the right of a seller to select his customers. He may discriminate in the choice of his customers. Not until there is discrimination in price among *those chosen* does [the RPA] have any application.") (emphasis added).

problems when combined with the court of appeals' holding discussed in part I above. A seller that grants a discount to its dealer to help it fashion a winning bid for one contract may find it is liable under the RPA if a disappointed bidder for a *different* contract insists that it should have received the same discount. Even though the two dealers are not bidding on the same contract, and are thus not competing for the same business, the supplier might be held liable under the court of appeals' interpretation of the RPA. However, any injury to the disappointed bidder does not flow from a difference in the prices the seller offers to its dealers; at most, it results simply from the high price offered to the disappointed bidder. Again, there is no antitrust injury.

The two-purchaser requirement spares the courts from playing indeterminate guessing-games. As one court has explained,

> for a plaintiff to show injury under the act . . ., consummated transactions are needed so that concrete, non-speculative price comparisons are available. In contrast, preliminary bargaining or offering circular prices are of such a speculative nature that without actual sales as a measure, the Court would be burdened with unduly post hoc speculative economic analysis in an increasingly expanded number of cases.

Republic Packaging Corp. v. Haveg Indus., Inc., 406 F. Supp. 379, 381 (N.D. Ill. 1976). This case illustrates such concerns. In the transactions in which Reeder did not purchase from Volvo, the court of appeals simply assumed that Reeder's bid would have won the business if only Volvo had offered a lower price. That is far from clear, however, and in one case it appears to be demonstrably false: Volvo

did not offer Reeder's competitor a lower price until *after* the competitor had won its bid. *See* J.A. 352-53.

There is no basis for requiring such speculation. The Court should reject the court of appeals' disregard of the two-purchaser rule.

CONCLUSION

There is no basis—in the language of the statute, in the precedents of this Court, or in the legislative history—for expanding the RPA to cover transactions in which favored and disfavored purchasers do not compete for the same business. Nor is there any basis for discarding the two-purchaser requirement in the context of competitive bidding. The court of appeals' decision should be reversed.

Respectfully submitted,

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No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

The National Automobile Dealers Association ("NADA") is a non-profit national trade association of new motor vehicle dealers.[1] NADA has over 20,000 members and represents over 43,000 separate franchises located in all 50 states. NADA's American Truck Dealers division has a membership of 2,299 franchised medium- and heavy-duty truck dealers, which comprises 88% of all such dealers in the United States.

NADA appears frequently as amicus curiae in cases that raise important issues to its members or their customers. Previously, NADA has filed amicus curiae briefs in this Court in cases involving federal antitrust laws, *State Oil Co. v. Khan*, 522 U.S. 3 (1997), state franchise laws, *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), and federal consumer laws, *Koons Buick Pontiac GMC, Inc. v. Nigh*, No. 03-377, 2004 U.S. LEXIS 7979 (Nov. 30, 2004). In addition, NADA has appeared as amicus curiae in numerous cases in other state and federal courts. NADA's involvement in monitoring the development, enactment, amendment, enforcement and interpretation of federal and state statutes that affect its members provides it with tangible experience and a unique perspective from which to assist a court regarding the application of these statutes. The Robinson-Patman Act, which is the subject of this lawsuit, is one such statute.

The issues in this case directly affect NADA's heavy-duty truck dealer members who compete in the same product market

[1] By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.6 of the Rules of this Court, counsel for amicus curiae states that no counsel for any party authored this brief in whole or in part and that no person or entity other than amicus curiae, its members or its counsel has made a monetary contribution to the preparation or submission of this brief.

as respondent Reeder-Simco GMC, Inc. ("Reeder"). These members have an obvious and vital interest in the outcome of this case. The same is true for NADA's other members, including those who sell automobiles and light- and medium-duty trucks, each of whom rely on the Robinson-Patman Act to ensure an opportunity to compete on an equal playing field with their competitors.

In this case, the Court of Appeals for the Eighth Circuit held that Reeder presented sufficient evidence to support the jury's verdict that petitioner Volvo Trucks North America, Inc. ("Volvo") discriminated against it in pricing for the purpose of eliminating it as a Volvo dealer. NADA and its members have a significant interest in ensuring that the courts prohibit motor vehicle manufacturers from using price discrimination as a way to circumvent federal and state laws that protect dealers from franchise terminations without good cause. Because dealers are small businesses relative to their manufacturers and because dealers rely on their manufacturers for their sole supply of new cars and trucks, they depend on the Robinson-Patman Act to supplement the laws that Congress and state legislatures have enacted to protect them "from perceived abusive and oppressive acts by the manufacturers." *Orrin W. Fox*, 439 U.S. at 100.

As a national trade association representing numerous competitors in the automobile and heavy-duty truck retail sales and service market, NADA can assist the Court in understanding the effects of price discrimination on competition generally as well as its effects on individual competitors and consumers in the market. In short, NADA is in a unique position to comment on Volvo's contention that its discriminatory pricing practices are neither anticompetitive nor within the reach of the Robinson-Patman Act.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the Robinson-Patman Act ("RPA") in 1936 as an amendment to § 2 of the Clayton Act. Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936). The RPA has been codified in 15 U.S.C. § 13. In short, under the RPA it is unlawful to discriminate in price if that discrimination has a "reasonable possibility" of harming competition between favored and disfavored purchasers and if that discrimination falls outside one of the defenses enumerated in the statute. *See Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983); *see also* 15 U.S.C. § 13(b).

The so-called "jurisdictional elements" of a § 2(a) violation are as follows: "(1) the sale must be in interstate commerce; (2) there must be a difference in price; (3) the discrimination must be 'between different purchasers,' *i.e.*, it must involve more than one purchase from the same seller; (4) the sale must be of goods or commodities; (5) the commodities sold must be of like grade and quality; and (6) the commodities must be sold for use, consumption or resale within the United States or its territories." 3 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW § 20.2 (1983).

In addition to proving these jurisdictional elements, an RPA plaintiff "must show . . . a *reasonable possibility* that a price difference *may* harm competition." *Vanco Beverage*, 460 U.S. at 434-35 (emphasis added). However, this showing "does not 'require that the discriminations must in fact have harmed competition.'" *Id.* at 435 (quoting *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981)); *see also Corn Products Refining Co. v. Federal Trade Comm'n*, 324 U.S. 726, 742 (1945)). This reasonable possibility of harm is

often referred to as competitive injury. *Vanco Beverage*, 460 U.S. at 435. A competitive injury may be shown by inference "by proof of a substantial price discrimination between competing purchasers over time." *Vanco Beverage*, 460 U.S. at 435 (citing *Federal Trade Comm'n v. Morton Salt*, 334 U.S. 37, 50-51 (1948)). "In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Vanco Beverage*, 460 U.S. at 435.

If an RPA plaintiff establishes the jurisdictional and competitive injury elements, a violation of § 2(a) exists unless the defendant proves one of the RPA's affirmative defenses. *Id.* Nevertheless, in order to recover damages for an RPA violation, a plaintiff must also make "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne*, 451 U.S. at 562; *see also* 15 U.S.C. § 15. An actual or antitrust injury may be established "'as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes.'" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969) (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)); *see also J. Truett Payne*, 451 U.S. at 565.

B. The Decision Below

The Court of Appeals for the Eighth Circuit held that Reeder presented sufficient evidence to sustain the jury's verdict that an RPA violation had occurred and that the violation caused injury to Reeder's business. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 711-15 (8th Cir. 2004); Pet. App. at 14a-22a. The Eighth Circuit held further that Reeder

showed that on several occasions it had purchased trucks from Volvo at prices substantially higher than Volvo charged other Volvo dealers for trucks of like grade and quality in reasonably contemporaneous sales. *Reeder-Simco*, 374 F.3d at 712; Pet. App. 16a. Volvo does not challenge this finding. Instead, Volvo challenges the Eighth Circuit's conclusion that sufficient evidence existed to sustain the jury's verdict as to competitive injury and antitrust injury.

As to competitive injury, the Eighth Circuit concluded that Reeder competed with price-favored Volvo dealers at the same functional level of distribution and within the same relevant geographic market. *Reeder-Simco*, 374 F.3d at 709; Pet. App. at 11a. The Eighth Circuit determined that Reeder had established a reasonable possibility of injury to competition on the basis of actual lost sales and profits that had been diverted to the favored Volvo dealers and because Volvo failed to rebut the presumption of competitive injury that arose from Reeder's evidence of "substantial price discrimination between competing purchasers over time." *Reeder-Simco*, 374 F.3d at 713; Pet. App. at 18a; *see also Vanco Beverage,* 460 U.S. at 435; *Morton Salt*, 334 U.S. at 50-51.

As to antitrust injury, the Eighth Circuit relied on evidence of at least one diverted sale and evidence that Reeder's sales and profits declined significantly during the period of Volvo's price discrimination, even though the industry as a whole was enjoying record sales and profits and even though Reeder was making greater efforts to sell Volvo heavy trucks. *Reeder-Simco*, 374 F.3d at 712-14; Pet. App. 17a-19a; *see also Zenith Radio*, 395 U.S. at 123-24; *Bigelow*, 327 U.S. at 264.

Volvo attacks the Eighth Circuit for upholding the jury's determination of competitive injury and antitrust injury on two fronts. First, it contends that the inference of competitive injury

(articulated in *Morton Salt* and *Vanco Beverage*) and the inference of antitrust injury (articulated in *Bigelow* and *Zenith Radio*) do not apply to markets characterized by head-to-head competition in bidding transactions and that a plaintiff in such a market must prove diverted sales in head-to-head competition in specific transactions with favored purchasers to satisfy either element of an RPA damages claim. Second, Volvo contends that evidence of diverted sales cannot be used to prove competitive and antitrust injuries unless a plaintiff can show that it actually made a purchase at the discriminatory price to deliver to a buyer who bought elsewhere.

In addition, Volvo asserts that the Eighth Circuit's holding harms competition by limiting pricing flexibility and suggests that this Court should require proof that price discrimination caused actual harm to competition generally in secondary-line RPA cases.

C. The Heavy-Duty Truck Market

The heavy-duty truck market in the United States is characterized by intense interbrand and intrabrand competition. The major brands of heavy-duty trucks sold in the country include Freightliner, International, Peterbilt, Kenworth, Mack and Volvo. The manufacturer of each brand distributes its trucks through a network of franchised dealers located throughout the country. For example, Volvo had approximately 143 franchised dealers in the United States as of December 2004. Other manufacturers have even more franchised dealers.

Consumers of heavy-duty trucks include owner-operators (individuals who own one or only a few trucks that they drive themselves), small- and medium-fleet owners and large-fleet owners. Many large-fleet owners have terminals at various locations throughout the United States and, as a result, are

physically located near several dealers that represent the same brand. Owner-operators are also exposed to a number of dealers offering the same brand by virtue of the fact that they drive their trucks along major highways where heavy-truck dealers are located and may stop at these dealerships for service, repairs or parts.

There are no significant barriers that prevent a heavy-duty truck buyer from purchasing trucks from any franchised dealer of the same brand throughout the country. Generally, dealers may designate any delivery destination for trucks that have been ordered from the manufacturer and a standard destination charge applies regardless of the distance the vehicle is shipped. Dealers are obligated by their franchise agreements to provide service and repairs for the brand of truck they are franchised to sell regardless of where those trucks were purchased. Because it is profitable, dealers generally welcome the parts and service business of truck owners who purchased their trucks from another dealer. Many large-fleet owners do their own service and repairs for which they must hire and train technicians, buy special tools and equipment, and stock parts for the truck brands that they own.

As a result, heavy-duty truck buyers are not restricted geographically in their truck-purchasing decisions by either cost or the need to reciprocate with the dealer providing most of the service or parts for their trucks. Buyers can, and often do, solicit and accept bids from dealers that are located far from where the buyer is physically located. Dealers are willing, and often seek, to provide bids for new truck sales to buyers located outside the dealer's assigned territory and even in other states. Heavy-duty truck franchise agreements do not prohibit dealers from selling to customers outside the dealer's assigned territory. The Eighth Circuit recognized this reality. *Reeder-Simco*, 374 F.3d at 709;

Pet. App. 11a ("Although Reeder had an assigned geographic area . . . it was free to sell outside that area, and did so.").

Heavy-duty truck buyers, however, do not solicit or accept bids from all potential sellers of trucks. As noted in the dissent in the Eighth Circuit, "[t]he evidence shows than an end user's decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation, and cold calling or other marketing strategies initiated by individual dealers." *Reeder-Simco,* 374 F.3d at 719 (Hansen, J., dissenting); Pet. App. 28a-29a. Thus, dealers compete in a broad relevant geographic market for the opportunity to provide bids to potential truck buyers.

Heavy-duty truck buyers face switching costs when buying a different brand of truck that they do not own already. In some cases, these costs are significant. For example, when a fleet owner services its own trucks, switching to another brand will require new training for technicians, new special tools and an expanded parts inventories. The need for additional driver training on a new brand and overcoming driver loyalty to the existing brand are additional factors affecting a truck fleet owner's decision whether to switch brands. Because of these switching costs, buyers have an incentive to limit the bids that they solicit to the same brands they own currently. Accordingly, many truck buyers solicit bids from more than one dealer of the same brand in order to create intrabrand price competition, particularly in situations in which the buyer is locked into predominately one brand of truck in its fleet.

Another characteristic of the heavy-duty truck market is that there are a limited number of purchase transactions compared with many other retail markets, such as cars and light trucks. There are fewer potential buyers of heavy-duty trucks than

buyers of cars and light trucks, and heavy-duty truck buyers that operate large fleets tend to purchase large numbers of trucks in a single order and then withhold further large volume purchases (sometimes for several years) until trucks in their fleets need to be replaced. This characteristic tends to magnify the loss of a particular sale to a heavy-duty truck dealer because sales opportunities are limited.

SUMMARY OF ARGUMENT

Reeder proved that it competes in the same relevant market as the price-favored Volvo dealers because heavy-duty truck buyers can turn to any Volvo dealer to solicit bids for new Volvo truck purchases. Competitors in the same relevant market are, by definition, competitors with each other without needing to show head-to-head competition for specific customers in that market.

Competition in the heavy-duty truck market includes competition for the *opportunity* to submit a bid to a particular customer. Price discrimination injures this competition by impairing the disfavored dealer's reputation for offering competitive bids and hindering its ability to implement effective marketing strategies that will persuade truck buyers to seek bids from it in the first instance.

Reeder established that a reasonable possibility existed that Volvo's price discrimination injured its ability to compete with favored Volvo dealers for the opportunity to submit bids for new Volvo trucks in the relevant market and, as a result, Reeder's sales and profits decreased. Reeder proved that the favored Volvo dealers received substantially larger price concessions from Volvo over a significant period of time and that during this time period, its sales and profits decreased while the sales and profits of other dealers increased. In response,

Volvo did not produce evidence that compelled the jury to find that the decline in Reeder's sales and profits was caused by some factor other than Volvo's price discrimination.

Reeder established further that it lost at least one sale of 10 new Volvo trucks in head-to-head competition with another Volvo dealer in which Volvo gave the favored dealer a larger discount than it gave to Reeder. The two-purchase requirement does not prevent this sale from factoring into the determination whether Reeder showed competitive and antitrust injuries. *Reeder-Simco,* 374 F.3d at 708-09; Pet. App. 8a-11a (court discussing two-purchase requirement). Reeder showed that it had purchased trucks from Volvo at prices greater than those paid by favored Volvo dealers in contemporaneous truck sales of like grade and quality. *Reeder-Simco,* 374 F.3d at 710-11; Pet. App. 12a-14a. Having met this element, Reeder should be allowed to rely on evidence of discriminatory price offers to show competitive and antitrust injuries.

The Court should reject Volvo's suggestion that an RPA plaintiff in a secondary-line case must prove harm to competition in general. Such a requirement is contrary to the plain language of the statute and its purpose and history as construed by this Court.

Upholding the RPA violation in this case will not harm competition. Under the RPA, a defendant may assert a meeting-competition defense. *See* 15 U.S.C. § 13(b) ("nothing contained herein shall prevent a seller rebutting the prima-facie case . . . by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor"). This defense would allow Volvo to lower its prices in specific transactions to meet another manufacturer's price concessions without offering that price concession to all dealers. On the other hand, application of the RPA in this case maintains intrabrand

competition among all Volvo dealers in the same relevant market by creating a competitive environment in which truck buyers know that all Volvo dealers compete from the same starting point.

In upholding the jury's determination as to competitive and antitrust injuries, the Eighth Circuit appropriately considered that Volvo used discriminatory pricing as a means to reduce the number of Volvo dealers. Elimination of a dealer obviously injures that dealer's competitive opportunities because it is no longer in business, which, in turn, further reduces intrabrand competition. Finally, the RPA supplements state and federal franchise protection laws that prevent manufacturers from terminating dealers without good cause. By preventing manufacturers from using discriminatory pricing to destroy a dealer's competitive opportunities, the RPA prevents a manufacturer from doing indirectly what the franchise protection laws prohibit it from doing directly.

ARGUMENT

I. NEITHER COMPETITIVE INJURY NOR ANTITRUST INJURY REQUIRES EVIDENCE OF HEAD-TO-HEAD COMPETITION

Volvo contends that Reeder failed to establish competitive and antitrust injuries because it did not show that it competed head-to-head in specific competitive bidding transactions against favored Volvo dealers. However, this contention ignores the fact that Reeder showed head-to-head competition with a favored Volvo dealer in at least two transactions. *Reeder-Simco*, 473 F.3d at 709; Pet. App. 11a-12a. This contention also ignores the fact that Reeder competed against favored Volvo dealers in the relevant market *for the opportunity* to provide bids to Volvo truck buyers and that it is likely that Volvo's

price discrimination substantially injured Reeder's ability to prevail in such competition. Indeed, the limited evidence of head-to-head competition in specific bidding transactions is likely the result of Volvo's discriminatory pricing.

A. Competitive Injury

It is axiomatic that sellers of the same product in the same relevant market are competitors for purposes of antitrust laws. The Court has described the "relevant geographic market" as "the 'area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.'" *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).

Volvo and its supporting amici curiae have cited no authority (and NADA is aware of none) that requires evidence of direct head-to-head competition between two sellers of the same product in the same relevant geographic market before the sellers can be regarded as competitors. If purchasers can "practicably turn" to either of two sellers to purchase the relevant product, the sellers compete for purposes of antitrust laws. *Id.* Accordingly, competition between disfavored and favored buyers can be established in RPA cases with proof that they compete at the same functional level and in the same relevant geographic market. *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987) (citing FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 173-80 (1962)).

Reeder established that it competed at the same functional level and in the same relevant market as Volvo's favored dealers. *Reeder-Simco*, 374 F.3d at 709; Pet. App. 11a-12a. Because all Volvo truck dealers sell new Volvo trucks to end

users, they all compete in the same relevant product market. *Id.* The Eighth Circuit held that Reeder permissibly sold outside its assigned geographic area, that retail truck buyers "are very mobile and price-shop nationwide" and that "there were no natural or physical barriers that would restrict the flow of heavy trucks in commerce or affect the freedom of customers to travel throughout the [southwest] region to purchase heavy trucks." *Id.* Thus, the undisputed facts establish that "the area of effective competition" in which Reeder competed and that purchasers can "practicably turn" to buy new Volvo trucks is at least as broad as Volvo's southwest region. Reeder and the favored Volvo dealers are competitors in this relevant market.

Moreover, competition in the relevant market includes competition for the opportunity to provide bids on new heavy-duty trucks to potential buyers. The dissent noted that "[t]he evidence shows that an end user's decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation, and cold calling or other marketing strategies initiated by individual dealers." *Reeder-Simco*, 374 F.3d at 719 (Hansen, J., dissenting); Pet. App. 28a-29a. Therefore, even the dissent agrees that all Volvo dealers that compete in the relevant geographic market are competitors for the opportunity to submit bids to end users in that market.

It is this opportunity to compete that triggers the injury that Volvo's discriminatory pricing set into motion. A disfavored Volvo dealer whose sales and profits have decreased because of price discrimination relative to a favored Volvo dealer, in turn, will have less capital with which to compete against the favored Volvo dealers for the opportunity to provide bids to end users. A favored Volvo dealer who regularly receives the best-price concessions is likely to earn a reputation for being able to offer the lowest retail price for Volvo trucks and, in turn, will be a

sought-after dealer. In contrast, a dealer who is the victim of significant price discrimination over time will be deprived of opportunities to go head-to-head in bidding against favored Volvo dealers because its "reputation," "cold calling" and "other marketing strategies" will be negatively affected by the discrimination.

This form of competitive injury is no different than that caused by price discrimination in other retail markets. Retailers typically compete through reputation, advertising and other marketing strategies to persuade end users to visit the retailer's store or web site. If price discrimination prevents, for example, a small retail grocer from developing a reputation for offering competitive pricing or from conducting aggressive advertising and other marketing strategies, it will lose sales to end users with whom it never had contact because they will go elsewhere to shop. This is no different from end users of trucks seeking out favored Volvo dealers for bids, instead of disfavored dealers such as Reeder, because of the perception that the favored dealers are more likely to offer a better price because of the favoritism Volvo bestows on them.

As one would expect, proof of head-to-head competition for a specific customer rarely exists in an RPA case. Typically, retailers buy products for resale without identifying the end users to whom they will attempt to resell those products. A small retail grocer, for example, cannot identify the specific end user who did not buy from it because that consumer shopped at a favored grocer that was able to offer lower prices and to more aggressively advertise as a result of the supplier's price discrimination. Likewise, Reeder cannot identify truck buyers that never gave it an opportunity to bid for their business because of Volvo's price discrimination. Having to tie specific purchase transactions to resale attempts to specific customers in head-to-head competition would, as a general rule, create an

insurmountable burden for RPA plaintiffs and tend to render the statute a nullity.

In addition, a requirement of head-to-head competition for specific customers in RPA secondary-line cases is wholly inconsistent with the Court's prior decisions that held that competitive injury will be presumed if the plaintiff shows substantial price discrimination over time and the defendant fails to rebut that presumption. *Vanco Beverage*, 460 U.S. at 435 (citing *Morton Salt*, 334 U.S. at 46). This presumption is based on the principle that the RPA does not require discrimination to have actually harmed competition, but only "a *reasonable possibility* that it *may* harm competition." *Vanco Beverage*, 460 U.S. at 434-35 (emphasis added); *Morton Salt*, 334 U.S. at 46.

In *Morton Salt,* the Court held that the finding of competitive injury was adequately supported by evidence that the seller's discounts resulted in price differentials between competing purchasers sufficient to influence their resale price. 334 U.S. at 47. The Court articulated clearly that a showing of actual financial losses in specific transactions is *not* required in secondary-line RPA cases, as follows:

> The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. . . . It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to

> the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

Id. at 50-51.

Reeder presented evidence of substantial price discrimination over time and a decline in its sales and profits during the period that the discrimination occurred. The favored Volvo dealers sought Volvo's larger price concessions to reduce the prices of the trucks they sold to end users and Volvo provided the concessions for this purpose. *Reeder-Simco*, 374 F.3d at 704; Pet. App. 2a; *see also* Pet. Br. at 3.

The presumption of competitive injury articulated in *Morton Salt* and its progeny allows an RPA plaintiff to establish a prima facie case of competitive injury by showing that substantial price discrimination occurred over time. *Morton Salt*, 334 U.S. at 46-47; *Vanco Beverage*, 460 U.S. 434-35. A defendant may rebut such a prima facie showing with evidence that breaks the causal connection between the price difference and the lost sales or profits. *Vanco Beverage*, 460 U.S. at 434-35. In this case, Volvo's attempt to rebut the *Morton Salt* presumption relies on its contention that Reeder and the favored Volvo dealers did not compete for Volvo truck sales by submitting bids to the same customers. Pet. Br. at 20-21. However, this contention ignores the competition that exists between Reeder and price-favored Volvo dealers in the relevant geographic market for the opportunity to provide bids in the first instance. Volvo and its supporting amici curiae point to no evidence that rebuts the presumption that Volvo's substantial price discrimination over time created a "reasonable possibility" of injury to this competition.

If anything, the limited evidence of diverted sales to favored dealers in specific transactions in which Reeder and a favored dealer submitted bids *supports* the presumption that the price discrimination caused end users to request bids from favored Volvo dealers rather than Reeder.

B. Antitrust Injury

The lack of head-to-head competition in specific transactions between Reeder and Volvo's favored dealers does not preclude a finding of an antitrust injury. In order to recover damages for an RPA violation, a plaintiff must show an antitrust injury, "'which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which made the defendants' acts unlawful.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (quoting *Zenith Radio*, 395 U.S. at 125); *see also* 15 U.S.C. § 15.

To establish an antitrust injury, a plaintiff must prove with reasonable certainty, a causal relation between the defendant's violation and the plaintiff's harm. *Bigelow*, 327 U.S. at 264; *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 561-66 (1931); *Zenith Radio*, 395 U.S. at 114 n.9, 123-24. However, "the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, the defendants' wrongful acts had caused damage to the plaintiffs.'" *Zenith Radio*, 395 U.S. at 123-24 (quoting *Bigelow*, 327 U.S. at 264); *see also J. Truett Payne*, 451 U.S. at 565-66.

The Court has held that "a just and reasonable inference" of an antitrust violation is sufficiently supported by comparing a plaintiff's actual profits with the contemporaneous profits of

competitors not subject to an antitrust violation and by comparing a plaintiff's profits during the time of the violation with the period immediately preceding the violation. *Bigelow*, 327 U.S. at 263-65. In *Zenith Radio*, the plaintiff compared its sales in a territory in which it was affected by the violation with sales in a territory in which it was unaffected, which the Court held was adequate to prove antitrust injury. *Zenith Radio*, 395 U.S. at 124-25; *see also J. Truett Payne*, 451 U.S. at 565-66.

The Eighth Circuit concluded correctly that sufficient evidence existed to show that Reeder had been injured by Volvo's RPA violation based, in part, on Reeder's "evidence that its own sales and profits were substantially reduced during the boom in the heavy truck industry despite an increase in its own sales efforts" during the period of Volvo's price discrimination. *Reeder-Simco*, 374 F.3d at 713; Pet. App. 18a.

Volvo points to no evidence that shows that the contradictory trend in Reeder's sales and profits relative to the industry and other Volvo dealers may have been caused, even in part, by factors other than Volvo's discriminatory pricing. However, even if Volvo had produced such evidence, it would not prevent a finding of antitrust injury because, even though a plaintiff must show that the antitrust violation was a material cause of its injury, it need not rule out all possible alternative sources of injury. *Zenith Radio*, 395 U.S. at 114 n.9, 123-24.

II. DISCRIMINATORY PRICE OFFERS CAN BE USED TO PROVE COMPETITIVE AND ANTITRUST INJURIES

Volvo contends that the "two-purchase" requirement prevents an RPA plaintiff from using discriminatory offers to sell a product to prove the elements of a § 2(a) violation or an antitrust injury. However, the two-purchase requirement is a

jurisdictional element and, once that element has been met, it does not preclude a plaintiff from using the effects of discriminatory price offers to prove competitive and antitrust injuries.

Section 2(a) of the RPA provides in relevant part:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a). The phrase "between different purchasers" creates a jurisdictional element that requires proof of two actual sales at different prices to two "different purchasers" from the same seller. KINTNER & BAUER, *supra*, § 20.5. Reeder met this burden by showing that, on several occasions, it purchased trucks from Volvo at higher prices than Volvo charged other Volvo dealers in reasonably contemporaneous sales of trucks of like grade and quality.

Volvo contends that only the lost sales and profits tied directly to these discriminatorily priced purchases can be used to prove competitive and antitrust injuries. However, such a conclusion requires the Court to ignore the many other occasions in which Reeder did not purchase trucks because Volvo refused to offer Reeder the same prices that it offered its favored Volvo dealers. No basis exists for this result in the language or history of the statute or in this Court's decisions.

After the jurisdictional elements of a § 2(a) violation have been established, the Court has held that a plaintiff need only show a "reasonable possibility" of competitive harm to establish a prima facie violation. *Morton Salt,* 334 U.S. at 46. In *Morton Salt*, the Court held that it was adequate "in itself" to show "price differentials between competing purchasers sufficient in amount to influence their resale prices of salt" in order to establish that the effect of such price discrimination ""may be substantially to lessen competition . . . and to injure, destroy, and prevent competition."" *Id.* at 47. "Here, the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." *Id.* at 46.

Offers at discriminatory prices harm a disfavored merchant's "competitive opportunities" as much as actual purchases at discriminatory prices. Such injury is illustrated by the evidence of Volvo's discriminatory price offers to Reeder. Because Volvo refused to offer Reeder the same price discounts that it offered to favored Volvo dealers, Reeder lost competitive bids, which, in turn, precluded it from ordering trucks from Volvo for those particular bid transactions. In these transactions, Reeder suffered competitive injury and lost sales as a result of Volvo's discriminatory pricing regardless whether Reeder purchased trucks at the discriminatory prices that Volvo imposed.

The Court of Appeals for the Fifth Circuit has held that a plaintiff is not bound to purchase the subject commodity at the discriminatory terms "in order to attain the status of a competing purchaser" because "its failure to do so was directly attributable to defendant's own discriminatory practice." *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir. 1951). However, even if the distinction between price discrimination victims who buy at the higher price and those

who refuse to do so were deemed relevant for determining whether a plaintiff has attained the status of competing "purchaser," it elevates form over substance when examining competitive and antitrust injuries caused by a seller's discriminatory pricing. Unlike the two-purchase requirement, a literal reading of the requirements for competitive injury and antitrust injury do not mandate that a plaintiff's lost sales be tied to actual purchases at the defendant's discriminatory prices.

Indeed, such a requirement would be illogical from an economic viewpoint for the simple reason that lost sales from price discrimination normally will result in the disfavored buyer purchasing less from the discriminating seller. Even in markets not characterized by competitive bidding transactions, substantial price discrimination over time will erode the demand for the disfavored buyer's products and cause it to purchase less from the seller. A small retailer who is the victim of price discrimination by a supplier may see its sales and, consequently, its purchases from the supplier decline. Congress did not intend to preclude a disfavored retailer from showing competitive or antitrust injury because the volume of its purchases were reduced as a result of the seller's price discrimination. Similarly, Congress did not intend to preclude an RPA plaintiff such as Reeder from showing competitive injury because its purchases in competitive bidding transactions, which characterize the heavy-duty truck market, were reduced as a result of Volvo's price discrimination.

In sum, Volvo's interpretation forces price discrimination victims to continue buying products for which there is no demand in order to recover under the RPA. Thus, it penalizes victims for mitigating their damages. Reeder's decision not to purchase trucks after it failed to win a competitive bid because of Volvo's discriminatory pricing was in mitigation of damages, just as a small grocery store mitigates its damages by reducing

its purchases from the supplier whose discriminatory pricing practices causes the store's sales to decline by reducing demand for its over-priced products. Congress never intended to preclude a disfavored buyer that mitigates its damages by reducing discriminatory purchases from using its lost sales and profits that result from discriminatory price offers as evidence of competitive and antitrust injuries.

III. EIGHTH CIRCUIT'S DECISION COMPORTS WITH PURPOSES UNDERLYING THE RPA

A. The RPA Does Not Require Injury to Competition in General in Secondary-Line Cases

Secondary-line RPA violations occur when a seller's price discrimination injures competition among the seller's customers. *Reeder-Simco*, 374 F.3d at 707; Pet. App. 8a. Volvo and its supporting amici curiae suggest that the Court should adopt a new requirement of harm to competition in general in secondary-line cases. However, adopting Volvo's position would require the Court to overturn its own precedent and, even worse, ignore the Court's past interpretations of Congress' intent as to secondary-line RPA cases.

In *Morton Salt,* the Court observed:

> [I]n enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act. The committee reports on the Robinson-Patman Act emphasized a belief that § 2 of the Clayton Act had *'been too restrictive, in requiring a showing of general injury to competitive conditions . . . .' The new provision, here*

> *controlling, was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'* Since there was evidence sufficient to show that the less-than-carload purchasers might have been handicapped in competing with the more favored carload purchasers by the differential in price established by respondent, the Commission was justified in finding that competition might have thereby been substantially lessened or have been injured within the meaning of the Act.

334 U.S. at 49-50 (ellipses in original; emphasis added).

The competitive injury requirement, as expressly described in § 2(a) of the RPA, can be met by proof that the effect of the discrimination may be: (1) "substantially to lessen competition or tend to create a monopoly in any line of commerce"; *or* (2) "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." 15 U.S.C. § 13(a). Harm to competition in general falls under the first alternative. Therefore, an interpretation that competitive injury can be proven with only evidence of harm to competition in general would result in reading the second alternative out of the statute entirely. Regardless how one perceives the wisdom of Congress' desire to protect the competitive opportunities of individual competitors from the adverse affects of price discrimination, the Court is not in a position to render the second alternative a nullity. *See Federal Trade Comm'n v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959) ("this Court is not in a position to review the economic wisdom of Congress").

B. Intrabrand Price Competition Protected Without Constraining Interbrand Price Competition

The RPA's meeting-competition defense, 15 U.S.C. § 13(b), gives Volvo the pricing flexibility necessary to match price concessions that competing manufacturers give their dealers. Volvo also may charge different prices when necessary to meet changing market conditions or when justified by cost differentials.

Volvo contends, however, that it needs pricing flexibility beyond that permitted under the RPA defenses. Whether such further pricing flexibility should be allowed must be left to Congress, not the Court. The Court is not in a position to allow price discrimination that violates the RPA because it may have anticompetitive effects in some instances. Moreover, Volvo has not demonstrated that further pricing flexibility is needed to preserve interbrand competition in the heavy-duty truck market.

Volvo's reasons for wanting greater price flexibility include its desire to "offer a larger discount for a retail customer that has historically purchased a different brand of truck" and "offer an even greater discount if that customer is expected to purchase a large number of trucks in the future." Pet. Br. at 3. In other words, Volvo would like to price discriminate against existing Volvo fleet owners and against small fleet owners who cannot be "expected to purchase a large number of trucks in the future." *Id.* However, Volvo has not shown that barring such discrimination injures competition.

In fact, there are ways that Volvo can subsidize a non-Volvo fleet owner's costs of switching to the Volvo brand other than by discriminating in new truck prices against existing Volvo owners. For example, Volvo can charge less for proprietary parts, provide broader warranty coverage or enhance dealer

service training for the benefit of all Volvo truck owners. These steps will increase Volvo truck sales in the long run by inducing non-Volvo fleet owners to switch brands while also retaining current Volvo fleet owners. Discriminating in price against existing Volvo fleets can benefit Volvo only in the short term. Ultimately, such discrimination would cause Volvo and its dealers to lose sales and market share.

Volvo may be able to price discriminate against existing Volvo fleet owners in the short term because of the high costs to switch to another truck brand. As explained earlier, truck fleet owners invest substantial amounts in driver training, repair technician training, repair tools and equipment, and parts and accessories that are specific to the particular truck brand that they currently own. This investment translates into high switching costs for a Volvo fleet owner to change to another truck brand. As a result, Volvo fleet owners may initially tolerate a higher retail price for Volvo trucks when replacing trucks in their fleet than they would for other brands. *See Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 476 (1992) ("If the cost of switching is high, consumers who already have purchased the equipment, and thus are 'locked in,' will tolerate some level of service-price increases before changing equipment brands.").

In *Eastman Kodak*, the Court recognized that, in markets with high switching costs, intrabrand competition may be necessary to prevent existing brand owners from paying supracompetitive prices for after-market service. *Id.* The same is true for replacement equipment. If Volvo were allowed to "price discriminate between its locked-in customers and potential new customers" as Volvo indicates that it would like to do, effective intrabrand competition is important to mitigate the adverse impact of such discrimination on the locked-in customers. Such competition forces a reduction in dealer

margins that partially compensates for the lower concessions that Volvo is willing to give on sales to locked-in customers.

Eliminating price discrimination among Volvo dealers is conducive to preserving effective intrabrand competition. If only one Volvo dealer were to receive Volvo's best price concession as to a particular Volvo truck owner, other Volvo dealers would be discouraged from seeking to bid for that owner's business. The Eighth Circuit's decision promotes effective intrabrand competition by ensuring an even playing field that encourages Volvo dealers to compete with each other for the opportunity to bid for end-user business. This is consistent with Congress' intent in enacting the RPA, which was "'to provide businesses with equality of opportunity so that they can start the race, the competitive race, on some basis of equality.'" UNITED STATES DEPT. OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT 145 (1977) (quoting Earl W. Kintner in testimony in *Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 94th Cong., 1st Sess. 153 (1975)). Such "equality of opportunity" protects not only the individual competitor, but in cases such as this in which intrabrand competition is material to preserving competitive pricing, it benefits competition in general.

C. The RPA Supplements Other Statutes that Protect Dealers from Unfair Treatment by Manufacturers

The Eighth Circuit's decision prevents Volvo from using price discrimination as a way to further injure intrabrand competition by dramatically reducing the number of Volvo dealers in the marketplace. Protecting the competitive interests of individual dealers is consistent with Congress' purpose in enacting the RPA. KINTNER AND BAUER, *supra*, § 19.6 (RPA

prohibits discrimination that results in either injury to competitive conditions or injury to competitors).

By protecting individual competitors, as well as competition in general, the RPA supplements other legislation, such as the Automobile Dealers Day in Court Act ("ADDCA"), 15 U.S.C. §§ 1221-1225, which safeguards individual car and truck dealers "from perceived abusive and oppressive acts by the manufacturers." *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox, Co.*, 439 U.S. 96, 100 (1978). The ADDCA, like the motor vehicle dealer statutes in most states, sets limits on a manufacturer's ability to reduce its dealer count by simply terminating or failing to renew dealer franchise agreements without good cause for doing so. Therefore, the Eighth Circuit's decision prevents a manufacturer from circumventing the ADDCA and state franchise laws by forcing some dealers out of business by charging them discriminatory prices. This application of the RPA is consistent with Congress' intent in protecting small businesses from the superior economic power of their larger suppliers and competitors, which is reflected in the language and history of both the Robinson-Patman Act and Automobile Dealers Day in Court Act.

CONCLUSION

Based on the foregoing reasons and authorities, the National Automobile Dealers Association respectfully requests that the U.S. Supreme Court affirm the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NORTH AMERICAN EQUIPMENT DEALERS ASSOCIATION, AMERICAN BOOKSELLERS ASSOCIATION, SERVICE STATION DEALERS OF AMERICA AND ALLIED TRADES, NATIONAL DISTRIBUTION CONTRACTING, INC., GROGAN'S HEALTHCARE SUPPLY, CLAFLIN COMPANY, AMERICAN MEDICAL DEPOT, ALL MED MEDICAL SUPPLY, LLC, AND MIDLAND MEDICAL SUPPLY CO. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Robinson-Patman Act liability may be imposed where the favored purchaser and the disfavored purchaser sold products of like grade and quality to customers located in the same geographic area during the same time period and engaged in periodic head-to-head competition on the same deals.

2. Whether Robinson-Patman Act liability may be imposed where the seller offers a price to a disfavored dealer in a competitive bidding situation but the disfavored dealer loses the bid to another dealer who received a more favorable price from the seller, where the disfavored dealer has also made contemporaneous purchases of other similar products from the seller at prices higher than those offered by the seller to the favored dealer.

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INTEREST OF *AMICI CURIAE* [1]

The American Booksellers Association ("ABA") is a non-profit industry association founded in 1900 that promotes

[1] *Amici curiae* have filed letters with the Clerk of the Court by which Petitioner and Respondent have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

independent bookstores. Members of the ABA compete on a regular basis with large national distributors such as Barnes & Noble and Amazon.com. The ABA and its members strongly support legislation which enables independent small businesses to compete on equal footing with national chain stores.

The North American Equipment Dealers Association ("NAEDA") was founded September 21, 1900, and is committed to building the best business environment for North American equipment dealers who sell agricultural, construction, industrial and outdoor power equipment in the United States and Canada. NAEDA is a non-profit industry association that has over 5,000 members with 18 affiliated state, regional and provincial associations.

Grogan's Healthcare Supply, The Claflin Company, Midland Medical Supply Co., Ameri an Medical Depot, National Distribution & Contracting, Inc. and All Med Medical Supply LLC are regional distributors of a wide range of healthcare supplies and equipment to hospitals, nursing homes, physicians, allied health providers and consumers. These distributors purchase from hundreds of major medical manufacturers and resell products to many thousands of healthcare providers throughout the United States. These distributors often compete with much larger national distribution organizations for business at the local and regional level. The ability to purchase goods at comparable costs to those competing national organizations is critical to the survival of their businesses.

The Service Station Dealers of America and Allied Trades ("SSDA") is a national nonprofit trade association which represents the interests of independent service station dealers located throughout the United States. SSDA, which was formed in 1948, represents 20 state and regional affiliates, which in turn represent over 15,000 independent dealers in over 25 states. These independent service station dealers have a vital interest in supporting legislation such as the Robinson-

Patman Act that enables them to compete fairly against larger national distributors.

SUMMARY OF ARGUMENT

The statutory language and the legislative history of the Robinson-Patman Act ("RPA") reveal that statute was intended to be prophylactic: to "catch the weed" of harm to competition "in the seed" of harm to an individual competitor. Requiring a plaintiff to prove harm to competition generally in order to make out a secondary-line RPA claim is at odds with this intent and with the plain language of the statute, which requires that such a plaintiff prove only that "the effect of such [price] discrimination *may* be . . . to injure, destroy, or prevent competition" with a knowing recipient of the benefit of the discrimination or its customers. 15 U.S.C. § 13(a) (emphasis added).

This view of the RPA does not, as some contend, lead to consumer harm. On the contrary, as was the intent of Congress in passing the RPA, it ensures (with certain specifically enumerated statutory exceptions) a level playing field for all distributors, both large and small, in terms of the cost of goods, thereby permitting those distributors to compete based on the efficiencies of their operations rather than on the basis of their ability to leverage a lower price from the seller. This, in turn, helps to ensure that the marketplace will reward the most efficient distributor, rather than simply the seller's favorite buyer or the buyer able to negotiate the lowest price from the seller.

The presumption of competitive harm identified by this Court in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), reflects the prophylactic nature of the RPA. Refusing to apply the *Morton Salt* presumption here would reflect a significant and unjustified scaling back of that principle, which has been repeatedly reaffirmed by this Court. As this Court explained in *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460

U.S. 428 (1983), the defendant bears the burden of coming forward with evidence that breaks the causal connection between a price differential and lost sales. Whether a defendant has met this burden is properly a question for the trier of fact.

The "transaction-specific" approach to competition advocated by petitioner would represent a fundamental departure from *Morton Salt* and its progeny as well as from the language and legislative history of the RPA. Under that approach, competition would have to be considered on a transaction-by-transaction basis. Such competition would contemplate only identical commodities and exactly contemporaneous sales. Never before has this Court required an RPA plaintiff to prove that it competed with a favored purchaser on a customer-by-customer, transaction-by-transaction basis. For the Court to now create such a requirement would be fundamentally at odds with the prophylactic nature of the RPA and with the plain language of the Act, which expressly provides that sales of non-identical commodities of "like grade and quality," as well as reasonably contemporaneous sales, fall within the scope of the RPA's prohibition against price discrimination.

The assertions that affirming the lower court would lead to unacceptable uncertainty for sellers and harm to consumers are unfounded. Congress provided sellers with multiple bases within the RPA for justifying price differences due to legitimate pro-competitive factors. Indeed, the RPA is subject to so many defenses and qualifications that some commentators have observed that it is of relatively limited practical effect. Nevertheless, sellers would prefer to weaken it further, and Petitioner, Volvo Trucks North America, Inc. ("Volvo"), seeks to effectively eliminate it altogether as it applies to the sale of heavy trucks and products purchased by wholesalers after receiving a customer order. It is respectfully suggested that the decision to roll back the RPA in that manner is not

one properly for this Court, but rather is a legislative matter for Congress.

ARGUMENT

I. THE RPA PROTECTS COMPETITION GENERALLY BY PROTECTING INDIVIDUAL COMPETITORS FROM PRICE DISCRIMINATION IN SECONDARY-LINE CASES

The RPA was enacted during the Great Depression of the 1930s in response to lobbying by independent wholesalers, brokers and retailers who were complaining of price discrimination by their suppliers in favor of large chain stores. Paul H. LaRue, *Robinson-Patman Act in the Twenty-First Century: Will the* Morton Salt *Presumption Be Retired,* 48 SMU L. Rev. 1917, 1917 (1995). While the antitrust laws generally protect the process of competition in the market as a whole, the RPA protects competition by addressing "individual competitive situations, rather than . . . a general system of competition." *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945); Terry Calvani & Gilde Beidenbach, *An Introduction to the Robinson-Patman Act and its Enforcement by the Government*, 59 Antitrust L.J. 765, 766 (1991). This philosophy is reflected in the oft-cited Senate report that accompanied the RPA, which stated: "Existing laws [referring to the Sherman and Clayton Acts] have been too restrictive in requiring a showing of competitive conditions in the line of commerce involved; whereas the more immediately important concern is an injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower." S. Rep. No. 74-1502, at 4 (1936). Thus, it has been recognized that both the language and the legislative history of the RPA "demonstrate a very specific intent on the part of Congress to 'strengthen' the provisions of the original Clayton Act, particularly as it applied to secondary line injury occasioned by the presence

of 'power buyers.'" Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of* Morton Salt: *To Save it, Let It Go*, 48 Emory L.J. 1057, 1059 (1999).

In accordance with this philosophy, Congress amended the language of Section 2 of the Clayton Act, which originally prohibited price discrimination only where its effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce" by adding an alternative standard that prohibited price discrimination where the effect of the discrimination "may be . . . to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a); Gavil, *supra*, at 1059-60. In *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), this Court recognized that this new provision "was intended to justify a finding of injury to competition" in a secondary-line case "by a showing of 'injury to the competitor victimized by the discrimination.'" 334 U.S. at 49 (quoting S. Rep. No. 74-1502, at 4).

This Court has recognized that the RPA is, by nature, "prophylactic." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981). That is, the goal of the RPA is to prevent general harm to competition *before it happens*. *Morton Salt*, 334 U.S. at 49. Indeed, Representative Patman "likened the prohibition of injury to individual competitors to an early trip wire, designed to signal competitive injury to consumers at the earliest moment." Gavil, *supra*, at 1071 (citing 80 Cong. Rec. 8115 (1936)). As such, an RPA plaintiff need only show a reasonable possibility of competitive harm. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983); *Morton Salt*, 334 U.S. at 46; *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 742 (1945). Any standard that requires *proof* of harm to competition generally as a prerequisite to making out a secondary-line claim under the RPA simply cannot be reconciled with the language or

legislative history of the Act, or with this Court's prior RPA decisions.

Volvo and many commentators have asserted that the RPA is out of step with other antitrust laws to the extent that it protects individual competition rather than competition generally, and that the RPA must be scaled back by the courts in order to bring it in line with the other antitrust laws. Often cited as justification for this position is this Court's pronouncement in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), that the RPA "should be construed consistently with broader policies of the antitrust laws." 509 U.S. at 220. Such arguments fail to recognize that forbidding a seller from discriminating in price among competing buyers when such discrimination does not fall within one of the statutorily enumerated exceptions *is* consistent with the broader policies of the antitrust laws.

Congress, in passing the RPA, expressed the concern that smaller buyers who were as efficient as or more efficient than larger buyers were being driven out of business due solely to the fact that the larger, less efficient buyers were able to leverage better pricing from suppliers. Congress recognized that price discrimination permitted such "power buyers" to use their size and purchasing power to make up for their lack of efficiency. *See FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963) (observing that the goal of the RPA is to ensure "to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned.") *See also* Gavil, *supra*, at 1064 (stating that the legislative history of the RPA "reveals how deeply concerned the Act's proponents were with preserving pricing practices that promoted efficiency and innovation in distribution practices" and that "throughout the legislative history, proponents of the Act . . . proceeded on the assumption that equally efficient rivals were being denied equal treatment due to the clout of the prototypical 'chain store'").

One effect of price discrimination is that it can give a less efficient distributor an (economically undeserved) competitive advantage that flows merely from its status as a favored purchaser. Ultimately, a more efficient but disfavored distributor is likely to succumb to its less efficient, but favored, competitor. Congress rightly recognized that this was not a socially desirable competitive outcome. Consumers (and society) are benefited when the competitive process identifies the most efficient competitors. If permitted a level playing field with less efficient buyers, more efficient buyers will be able to offer consumers lower prices or better services, or both. Price discrimination in favor of less efficient buyers undermines this process because competitors are subject to failing not because they are less efficient, but rather merely because they are smaller and thus less able to leverage low prices from suppliers. In this important respect, then, the RPA's goal of eliminating price discrimination among competing buyers is completely consistent with the policies underlying the antitrust laws.

II. THE *MORTON SALT* PRESUMPTION APPLIES WHERE THERE IS SUBSTANTIAL PRICE DISCRIMINATION OVER TIME BETWEEN PURCHASERS IN COMPETITION WITH ONE ANOTHER

First recognized in *FTC v. Morton Salt Co.*, 334 U.S. 46 (1948), and most recently affirmed by this Court in *Texaco v. Hasbrouck*, 496 U.S. 543, 559 (1990), the *Morton Salt* presumption infers that a plaintiff's ability to compete with other purchasers is injured whenever that plaintiff can show that it paid "substantially more for [its] goods than [its] competitors had to pay." *Morton Salt*, 334 U.S. at 46-47. *See also Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) ("[I]njury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time.").

As this Court concluded in *Morton Salt*, it is entirely consistent with the language and legislative history of the RPA to presume competitive harm where there is evidence of price discrimination among competing purchasers over time. Indeed, while concerns of power buyers clearly motivated the passage of the RPA, this Court has held that the RPA is not limited only to situations involving power buyers. *Falls City*, 460 U.S. at 436 (considering and rejecting the argument that the RPA should be applied only in cases involving large buyer preference or seller predation, and observing that although concerns about "the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act," the text of the Act "is of general applicability and prohibits discriminations generally."). Furthermore, inasmuch as the RPA is a prophylactic statute, *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981), such a presumption serves the purpose of stopping harm to competition generally in the "seed" of individual competitive harm, before it has metastasized.

A plaintiff advancing a secondary-line claim under the RPA is entitled to the *Morton Salt* presumption where that plaintiff presents evidence demonstrating two facts: (1) the plaintiff was the victim of substantial price discrimination over time; and (2) the favored purchaser and the plaintiff were in competition with one another at the same functional level.

Here, Volvo does not dispute that other Volvo dealers systematically received better prices on the Volvo trucks they purchased from Volvo than did Respondent, Reeder-Simco GMC, Inc. ("Reeder"). Thus, the first factual prerequisite to the *Morton Salt* presumption is met. Volvo argues, rather, that the second factual prerequisite to the *Morton Salt* presumption is not met here, contending that the factual record does not support a finding that Reeder competed with Volvo dealers who received more favorable pricing than did Reeder.

The undisputed facts, however, show that Reeder did compete with the favored Volvo dealers. For example, uncontroverted evidence demonstrates that both Reeder and the favored Volvo dealers sold to customers in the same geographic area. J.A. 174, 412. Further, Reeder presented evidence of several instances when it competed head-to-head with a favored Volvo dealer for a sale to a customer. J.A. 304-05. Indeed, while Volvo points to testimony that, generally speaking, competition among Volvo dealers for the same sale was "the exception rather than the rule," that testimony actually *establishes* that such competition *did occur*. Other testimony heard by the jury also confirms that Reeder competed with other Volvo dealers. J.A. 174, 412. Taken together, all of this evidence plainly demonstrates that Reeder was in competition with the favored Volvo dealers.

In an attempt to avoid this inescapable conclusion, Volvo asks this Court to compartmentalize the evidence when evaluating whether the second factual prerequisite to the *Morton Salt* presumption is met. By viewing the evidence on a transaction-specific basis, Volvo would have this Court ignore the instances of head-to-head competition, claiming that they cannot support Reeder's RPA claim because in those instances Reeder lost the bid (due, of course, to the price discrimination) and therefore the so-called "two purchaser rule" is not met with respect to those specific transactions. Volvo then dismisses the instances where Reeder did purchase from Volvo (albeit at higher prices than Volvo afforded to other Volvo dealers) and those instances in which Reeder lost a sale to a dealer of another line-make on the grounds that Reeder was not competing with the favored Volvo dealers in those particular transactions. Only after defining competition in this novel manner can Volvo frame the question presented as one of whether an RPA claim exists where the plaintiff does not compete with the favored purchasers. Under the traditional definition of competition, however, it is clear that

Reeder *did* compete with the other favored Volvo dealers and, as such, is entitled to the *Morton Salt* presumption.

The transaction-specific definition of "competition" advocated by Volvo is contrary to the plain meaning of that term in the RPA and is a dramatic departure from any definition of competition ever recognized by this Court in the context of an antitrust case. This Court has repeatedly held that firms are in competition with one another when they seek to sell to the same customers in the same relevant product and geographic market. *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (holding that firms effectively compete with each other where a purchaser can practicably turn to those firms as a source of supply); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 359 (1963) (defining the area of competition as the area in which the seller operates and where consumers may purchase). This Court applied such a definition of competition in the secondary-line RPA context in *Falls City*, observing that beer wholesalers compete where they operate at the same functional level and sell the same products to customers in the same geographic area. *Falls City*, 460 U.S. at 436.

There is no principled reason to veer away from this well-settled definition of competition in favor of Volvo's novel transaction-specific approach. Indeed, in accordance with this Court's pronouncement in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993), that the RPA should be interpreted consistently with other antitrust laws, the traditional definition of competition from prior antitrust cases should be applied to the RPA.

The statutory language of the RPA further demonstrates that the traditional definition of competition must be applied in this particular situation. The term "competition" appears two times in Section 2(a): first, in the "general injury" clause of Section 2(a), which forbids price discrimination the effect of which "may be to substantially lessen competition or tend

to create a monopoly in any line of commerce," and then again in the "individualized injury" clause of Section 2(a), which forbids price discrimination the effect of which may be "to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." It cannot be disputed that, as used in the general injury clause of Section 2(a), "competition" has the meaning traditionally ascribed to that term in other antitrust contexts. In light of the maxim of statutory interpretation requiring that terms be interpreted to have the same meaning throughout a statute, *see Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932), the term "competition" as used in the individualized injury clause of Section 2(a) must be afforded the same meaning given to that term in the general injury clause of Section 2(a). Inasmuch as Volvo's novel transaction-specific definition of competition differs from the established definition of competition that is clearly applied in the general injury clause of Section 2(a), this Court should reject that definition.

In addition to creating an irreconcilable internal definitional conflict, Volvo's novel transaction-specific view of competition is also at odds with the plain language of the RPA. Under Volvo's transaction-specific view of competition, price discrimination would be actionable in a secondary line case only when a disfavored buyer could prove it was competing with a favored buyer to make the *same sale* to the *same customer*. However, the RPA plainly contemplates that actionable discrimination is not limited to such head-to-head, "same sale/same customer" circumstances.

Under Volvo's transaction-specific approach, discrimination would be forbidden only in exactly contemporaneous sales. The RPA, however, prohibits price discrimination when the sales in question are "reasonably contemporaneous," not only when they are exactly contemporaneous. *See*

James A. Pikl, *The Myth of "Functional Availability" and the Robinson-Patman Act*, 2002 Fed. Cts. L. Rev. 1, 35-38 (2002). Furthermore, the RPA prohibits price discrimination in "comparable" transactions involving goods of "like grade and quality." *FTC v. Borden*, 383 U.S. 637, 643 (1966). Volvo's transaction-specific approach is inconsistent with this notion because it would prohibit discrimination only in transactions involving the exact same goods. *See generally* Pikl, *supra*, at 35-38 (pointing out that a transaction-specific view of competition under the RPA is at odds with the fact that the statute extends to reasonably contemporaneous sales, as well as to comparable transactions involving goods of like grade and quality.)

While Volvo points to this Court's decision in *Falls City* for the proposition that the *Morton Salt* presumption may be overcome by "evidence breaking the causal connection between a price differential and lost sales or profits," *Falls City*, 460 U.S. at 435, it is incumbent on Volvo to come forward with such evidence, and Volvo did not do so. Moreover, the question of whether evidence was presented that was sufficient to break the causal connection between price discrimination and lost sales or profits is one of fact properly left to the trier of fact, particularly where, as here, the plaintiff has presented compelling evidence demonstrating a link between price discrimination and lost sales and profits.

III. ADOPTING PETITIONER'S INTERPRETATION OF THE RPA WOULD EFFECTIVELY REPEAL THE RPA

Were the Court to narrow or abandon the *Morton Salt* presumption or adopt Volvo's novel transaction-specific definition of competition, the consequences to distributors and other small businesses that are RPA "purchasers" would be devastating. Volvo's transaction-specific view of competition, when coupled with Volvo's transaction-specific view of the "two purchaser rule," would effectively repeal the RPA

with respect to lines of commerce involving competitive bidding or wholesale purchases occurring after a customer places its order.[2]

Under Volvo's approach, the RPA would be applicable only in industries where buyers purchase goods for inventory. Thus, price discrimination would be completely permissible in large, and growing, segments of commerce where goods are purchased only after a sale is secured, a segment that includes a large portion of the class 8 truck market. If Congress had intended to exempt such a large segment of commerce from the RPA, it can be safely presumed that it would have clearly manifested that intent in the text of the Act. In fact, neither the language of the RPA nor its legislative history evidences any such intent.

Nowhere in the text of the RPA or in its legislative history is there any indication that Congress intended for the Act to apply to protect only buyers who purchased goods for inventory, or that Congress intended to exempt from the reach of the Act sellers who participated in that segment of commerce where goods are not purchased for inventory. Further, there are no special features about businesses where goods are purchased after a competitive bidding process or after a customer places its order that would justify refusing to apply the RPA in such circumstances. On the contrary, price discrimination would seem to be at least equally problematic in such businesses as in lines of business where goods are purchased for inventory. Price discrimination leads to the same anticompetitive effect in both areas. As this Court has recognized, in enacting the RPA, "Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source." *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963).

[2] Volvo repeatedly asserts in its papers that no harm could possibly have come to Reeder as a result of price discrimination because Volvo had a policy to equalize dealers when they were competing on the same deal. However, were this Court to accept the arguments being advanced by Volvo, Volvo and other sellers *would not even be required to equalize dealers who were bidding head-to-head on the same deal*. This is because only one dealer would ultimately win the bid and, under Volvo's view of the two purchaser rule, none of the unsuccessful bidders could make out a claim under the RPA. Certainly, Congress could not have possibly intended to permit such a result.

Volvo's view of the RPA would also have devastating consequences outside the competitive bidding context. Under Volvo's novel transaction-specific view of competition, in order for a plaintiff to make out an RPA claim, the plaintiff would have to prove that it competed with favored purchasers on a customer-by-customer basis. Simply proving that it sold the same products into the same geographic area as a favored purchaser would not, under Volvo's approach, be sufficient to prove that the plaintiff competed with that favored purchaser. Requiring such proof would raise the evidentiary bar for a RPA claim so high that it would be extremely difficult for a plaintiff to prove such a claim—an outcome plainly inconsistent with the prophylactic nature of the RPA.

Presumably due to the same philosophical differences with the RPA that are expressed in their *amicus curiae* brief in this case, the federal antitrust enforcement agencies have effectively abandoned enforcement of the RPA. As a result, civil actions by private plaintiffs are the last bastion of defense against price discrimination. The substantial raising of the evidentiary bar that would follow from Volvo's transaction-specific view of competition and the two purchaser rule would create a very high evidentiary burden leaving RPA "purchasers" with little defense against price discrimination.

Any roll back of the RPA would have dire consequences for distributors and retailers and, in turn, for consumers and society in general. Sellers would be largely or entirely free to blatantly discriminate among purchasers, giving them near total control over the downstream distribution of their prod-

ucts. Sellers could use price discrimination to "punish" purchasers who engaged in price discounting and other pro-consumer practices that were not looked upon favorably by the seller. Sellers, such as Volvo, who face legal limitations on their ability to terminate distributors and dealers could easily avoid such limitations and accomplish the very same ends through price discrimination. Purchasers would survive only at the pleasure of the supplier. Consequently, purchasers likely would invest more sparingly in their businesses for fear that their investments might vanish should they fall out of favor with the supplier and find themselves on the receiving end of unfavorable pricing.

Society benefits from strong, independent distributors and retailers. Such businesses are the backbone of the American economy. They are the embodiment of the American dream of self-employment and self-sufficiency. Such businesses, no matter how small, deserve the opportunity to compete on a level playing field with their larger brethren, in order that the best competitor might prevail, not merely the largest. This notion of meritocracy, which dates back to the founding of our Nation, was the animating spirit of the RPA. The views advanced by Volvo simply cannot be reconciled with the intent of Congress. If those views are accepted by this Court, it would work an irreparable harm to the RPA and to small businesses throughout the United States.

IV. THE CONTENTIONS THAT AFFIRMING THE COURT BELOW WOULD RESULT IN COMPLIANCE PROBLEMS AND PRICE RIGIDITY ARE MERITLESS

Several manufacturer-oriented organizations have submitted *amicus curiae* briefs in which a common theme emerges. Those *amici*, and Volvo, contend that affirming the ruling of the Eighth Circuit below would have the effect of putting a pricing straitjacket on manufacturers, who would simply end all discounting for fear of subjecting themselves to RPA

liability. Those contentions should be dismissed as nothing more than overstatements designed to bring about a desired outcome.

As a preliminary matter, it must be remembered that the RPA, by its terms, is of limited scope. It applies only to "sales" of "commodities." 15 U.S.C. § 13(a). The sales must be reasonably contemporaneous. *Id.* The commodities must be of "like grade and quality." *Id.* The Act applies only when the commodities are "sold for use, consumption or resale within the United States." *Id.* The same seller must make the discriminatory sales. *Id.* Two different buyers must purchase from the same seller. *Id.* Those buyers must compete at the same functional level. *Texaco v. Hasbrouck*, 496 U.S. 543 (1990). The transaction must have been "in commerce," meaning the product sold must physically cross a state boundary. 15 U.S.C. § 13(a); *Standard Oil Co. v. FTC*, 340 U.S. 231, 236-37 (1951). And, of course, there must be a difference in price charged to the two buyers. 15 U.S.C. § 13(a). Only if all of these "gatekeeper" elements are satisfied can a plaintiff make out a prima facie RPA claim.

Moreover, Congress expressly exempted certain types of price discrimination from the reach of the RPA. The RPA recognizes a defense to price discrimination based on "due allowance for difference in the cost of manufacture, sale or delivery resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered." 15 U.S.C. § 13(a). This provision, known as the "cost justification defense," offers sellers significant pricing flexibility. Likewise, the "meeting competition defense," which permits price discrimination by a seller where the seller is attempting in good faith to meet a competitor's price, 15 U.S.C. § 13(b), also affords broad pricing flexibility to sellers seeking to offer competitive pricing.

Should this Court affirm the ruling below, sellers will continue to have significant pricing flexibility. In an attempt to

add support for their argument to the contrary, *amici* supporting Volvo raise a number of policy arguments that simply do not have merit. For example, the American Petroleum Institute argues that "[b]efore the decision below, sellers could be comfortable . . . charging different prices to dealers, so long as it was clear that those dealers were not competitors for the same business" and even goes so far as to claim that "[a] seller could no longer rely on identification of separate geographic markets" if this Court were to affirm the decision below. Brief of the American Petroleum Industry as *Amicus Curiae* in Support of Petitioner at 8, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (U.S. May 20, 2005). However, as explained above, here there is ample evidence that Reeder was in competition (as that term has traditionally been understood in antitrust jurisprudence) with the favored Volvo dealers and that Reeder and the favored Volvo dealers competed for and made sales in the same geographic area. In light of such evidence, the concerns expressed by the American Petroleum Institute are misplaced. Affirming the decision below would be well within the boundaries of established RPA jurisprudence.

The American Petroleum Institute also argues that restricting a seller's ability to engage in price discrimination will cause sellers to be more reluctant to adjust prices in response to market conditions. Brief of the American Petroleum Industry, *supra*, at 8. Here again, this statement ignores well-established RPA jurisprudence. The RPA plainly contemplates that a seller is permitted to change its prices when market conditions change. In fact, the RPA expressly says as much, virtually word-for-word: "[N]othing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for . . . the goods concerned." 15 U.S.C. § 13(a). Many courts have recognized that changing market conditions can justify pricing differentials. *See, e.g., Comcoa, Inc. v. NEC Tels., Inc.*, 931

F.2d 655, 661 (10th Cir. 1991); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 680 (S.D. Ind. 1988).

The intent of Congress, as evidenced through the language of the RPA, was that where a plaintiff could demonstrate price discrimination that met certain criteria, then the burden would shift to the defendant to come forward with evidence that the discrimination was justified. *See* 15 U.S.C. § 13(b) ("Upon proof being made . . . that there has been discrimination . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . .") The concerns expressed by the American Petroleum Institute and other *amici* supporting Volvo reflect a deep-seated discontentment with that statutory structure. Simply put, they do not want to bear the burden of having to justify price discrimination when a plaintiff makes out a prima facie case. Their unhappiness with the choices made by Congress is not a reason for this Court to undo this law. The repeal or revision of the RPA is for Congress to choose to do, and the fact that Congress has elected not to act despite a steady stream of calls to do so over the past several years, even decades, is still more reason for this Court to take great care to honor existing precedents and established RPA jurisprudence.

In its *amicus curiae* brief, the National Electric Manufacturers Association contends that if manufacturers are not permitted to engage in price discrimination, then resellers will be unable to differentiate themselves in the minds of their customers on the basis of price. Brief of the National Electrical Manufacturers Ass'n as *Amicus Curiae* in Support of Petitioner, at 9, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (U.S. May 20, 2005). This contention is both inaccurate and rather telling. It is telling insofar as it suggests that resellers use special pricing concessions from their suppliers to "differentiate themselves" from other, less favored resellers in the mind of the customer on

the basis of price. This is precisely why Congress passed the RPA: Congress thought it unfair that a reseller would be able to win business away from its competitors based solely on the fact that it was the beneficiary of price discrimination by a supplier. Thus, this argument serves not as a point in favor of price discrimination of the sort at issue here, but as a compelling argument against it.

The statement is inaccurate because it wrongly assumes that if different resellers pay the same price for an item, they will price that item the same when offering it for resale. While a reseller's resale price will be determined in part by its cost of goods, that resale price will also be affected by the reseller's profit margin needs and desires, and those needs and desires will vary among resellers. The automotive industry serves to demonstrate this point. Typically, all car dealers of a particular line-make pay the same price for the cars they purchase from the manufacturer. Yet we all know from personal experience and observation that car prices to consumers vary from dealer to dealer, even on the exact same model equipped with the same extras. This is because one dealer may elect to pursue a low margin-high volume philosophy, while another may stress serviee over price. Similarly, one dealer might run a highly efficient operation and thus be able to offer a smaller mark-up as compared to a different dealer that has a less efficient operation. In sum, even when the seller charges them the same price for the goods at issue there is ample opportunity for resellers to differentiate themselves in the mind of a customer on the basis of price.

Yet perhaps the most insidious notion advanced in support of reversing the decision of the court below is that consumers are benefited through lower prices as a result of Volvo's inherently discriminatory method of pricing its trucks. Far from generating lower prices for customers, Volvo's pricing mechanism is an artifice used by Volvo (and most, if not all, other manufacturers of class 8 trucks) to *keep prices high.*

The pricing mechanism works as follows. First, a manufacturer sets an artificially high dealer list price. This forces dealers to approach the manufacturer for a pricing concession on each potential deal, which, in turn, enables the manufacturer to control dealer profit margins. This pricing mechanism also permits the manufacturer to "steer" deals to—and away from—particular dealers through price discrimination, thereby ultimately permitting the manufacturer to exercise a degree of control over its dealers that is at odds with federal and state laws designed to limit such control. This system, which can be used to generate plainly anti-consumer outcomes, is not one worthy of preserving, especially at the expense of the entire RPA.[3]

When Congress passed the RPA, it expressed its desire that purchasers at the same functional level have a level playing field in terms of the cost of goods. Congress recognized that in certain circumstances price differences would not be an evil, and even would be desirable, and thus Congress created certain statutory defenses to account for such circumstances. In so doing, Congress made a value judgment regarding the proper balance between socially desirable goals such as pricing flexibility and the societal ills Congress perceived in price discrimination. This Court should not disturb that balance by heeding the invitation of Volvo and supporting *amici* to legislate from the bench.

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[3] Volvo labels its pricing scheme as "competitive bidding." That is a misnomer. Volvo's sales process does not involve a purchaser soliciting bids to obtain the lowest possible price, as with a requirements contract for a specified period. Instead, Volvo forces its pricing system on purchasers every time they seek to purchase a truck. This "competitive bidding" actually enables Volvo to inflate prices.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

Whether under the Robinson-Patman Act a jury may infer the reasonable possibility of competitive injury from massive price discrimination in favor of competitors in the same market on more than half of the disfavored purchaser's purchases for resale in the period, and in amounts far exceeding such purchaser's total gross annual profits.

Whether there was sufficient evidence to establish antitrust injury under section 4 of the Clayton Act.

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RESPONDENT'S BRIEF ON THE MERITS

Petitioner Volvo Trucks North America, Inc. ("Volvo") seeks a license to engage in blatant and debilitating price discrimination, advancing claims that mischaracterize the Robinson-Patman Act ("RPA") and the evidence in this case. Although unacknowledged by Volvo, respondent Reeder-Simco GMC, Inc. ("Reeder") proved extraordinary price discrimination by Volvo at trial, including discrimination of more than $280,000 on the *purchase* for resale of 102 trucks by Reeder from 1996 to 1998. That discrimination occurred on over 55% of Reeder's total purchases during that time span, and dwarfed Reeder's annual gross profits on heavy-truck sales. Volvo used such discrimination to implement a corporate policy of eliminating smaller dealers.

Volvo attempts to negate the jury verdict and judgment by positing that as a matter of law such massive discrimination cannot create a reasonable possibility of injury to Reeder's competition with favored Volvo dealers. Volvo's argument turns on a novel transactional theory of "competition" under the RPA, whereby the only competition that is protected from injury is limited to that between rivals bidding for a specific customer's business. But under the RPA, this Court, lower courts, and leading commentators have long defined "competition" as vying to serve customers in the same relevant market, and thus any substantial discrimination that has a probable future effect of injuring competition with favored purchasers in the market violates the Act. The evidence at trial supporting such an inference of competitive injury was overwhelming. Volvo's alternative argument that a jury may only infer competitive injury under *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), if the favored purchaser has market power against the seller sufficient to affect intrabrand competition is waived (both because Volvo never sought such a jury instruction at trial and because it did not raise the question in its petition for certiorari). Regardless, that argument, as well as its additional arguments on antitrust injury, are contrary to nu-

merous precedents of this Court. In short, Volvo and its amici ask for nothing less than a judicial repeal of the Robinson-Patman Act. This Court has previously resisted calls "to amend the Robinson-Patman Act judicially," *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 78 (1979), and it should follow that course here.

STATEMENT OF THE CASE

A. *Statutory Background.*

The Robinson-Patman Act ("RPA") was enacted in 1936 to amend § 2 of the Clayton Act of 1914, which also prohibited price discrimination, but only in very limited ways. The Clayton Act made it "unlawful for any person" to "discriminate in price between different purchasers of commodities," "either directly or indirectly," where the "commodities are sold for use, consumption, or resale" and "the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Act of Oct. 15, 1914, ch. 323, § 2, 38 Stat. 730, 730.

By 1936, the Clayton Act was seen as "'too restrictive[] in requiring a showing of general injury to competitive conditions.'" *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 49 (1948) (quoting S. Rep. No. 74-1502, at 4 (1936)); *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 350 (1968) (Clayton Act was "an inadequate deterrent against outright price discrimination"). Congress was presented with "overwhelming" evidence "that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary." H. R. Rep. No. 74-2287, pt. 1, at 3 (1936). Thus, Congress amended the Clayton Act to prohibit price discrimination not only where it may have the effect to "substantially . . . lessen competition or tend to create a monopoly," but also where it may have the effect to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with

customers of either of them." 15 U.S.C. § 13(a). "The new provision . . . was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'" *Morton Salt*, 334 U.S. at 49 (quoting S. Rep. No. 74-1502, at 4). Outlawing discrimination injurious to individualized competition supported the Clayton Act's purposes, for "'[o]nly through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.'" *Id.* at 50 n.18 (quoting S. Rep. No. 74-1502, at 4).

While congressional concern over the predatory practices of chain stores may have been "the immediate and generating cause of the Robinson-Patman amendments," *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 520 (1963), "neither the scope nor the intent of the statute was limited to that precise situation or set of circumstances. Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source." *Id.* (citing H. R. Rep. No. 74-2287, at 6) (the Act's "'guiding ideal'" is the "'preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production'"). In the words of this Court, "Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." *Id.*

Congress provided various defenses in the RPA to protect the competitive pricing flexibility of sellers. The Act is not violated if the price discrimination is attributable to "differences in the cost of manufacture, sale, or delivery," 15 U.S.C. § 13(a), or to "price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned," *id.*, or if the "lower price . . . was made in good faith to meet an equally low price of a competitor." *Id.* § 13(b).

Beyond those explicit exceptions, however, Congress sought to protect the equality of opportunity of merchants regardless of any countervailing economic arguments in favor of price discrimination. Such arguments by the Act's opponents, *e.g.*, H.R. Rep. No. 74-2287, pt. 2, at 4-5 (1936) (minority views), were rejected, and the House of Representatives defeated an amendment that would have prevented construing or applying the Act to "'increase the cost of goods . . . to the consumer,'" 80 Cong. Rec. 8223, 8238 (1936); Department of Justice, *Report on the Robinson-Patman Act* 150-51 (1976) (DOJ Report). There was strong sentiment in the Depression to protect the livelihood of the small merchant, "leading Congress to believe that . . . protection of the wholesaler and the retailer was consistent with the public interest in preserving time-honored values: independence, self-reliance, dispersion of power, and familiar social structures." DOJ Report at 137. Congress thus adopted a bright-line rule protecting price discrimination that it judged in the public interest – that responding to cost differences, market conditions, or competitive prices – while ensuring that independent merchants could compete on equal footing with their rivals.

B. *Industry Background.*

This case concerns the market for heavy-duty trucks, commonly referred to as Class 8 trucks (*i.e.*, trucks weighing over 33,000 pounds). Class 8 trucks include tractor trailers used for freight transportation, as well as vocational trucks like mixers or dump trucks. The principal manufacturers of Class 8 trucks include Freightliner, International, Peterbilt, Kenworth and Volvo. *See* Tr. 1004.

The interstate trucking industry that purchases class 8 trucks is an intensely competitive and highly cost-sensitive business, comprised of a mix of firms that include small to very large fleets, and owner-operators.[1] Truck manufacturers

[1] C. Engel, *Competition Drives The Trucking Industry*, 121 Monthly Lab. Rev. Online (1998), *available at* http://www.bls.gov/opub/mlr/1998/04/art3full.pdf.

generally offer base models with a fixed set of component options (such as engine type, transmissions, and rear axle packages). JA 327; see, *e.g.*, International Truck & Engine Corp., International® 9200i, http://www.internationaldelivers.com/site_layout/vehiclecenters/detail.asp?model=9200i (last visited July 25, 2005) (sample of competitive truck). Although dealers sell some trucks from inventory, it would be prohibitively costly for any dealer to maintain a full product line in inventory. Petr. Br. 2. Typically, the customer negotiates with a dealer to select the offered components appropriate for its business, and the truck is built to order. JA 14. Because each manufacturer offers similar commodities that perform the same essential function (*e.g.*, hauling a load from point A to B), Class 8 trucks are highly substitutable products, and competition is keen and profit margins are thin in the Class 8 market. JA 346, 407-08, 418.

C. *The Facts of this Case.*

Volvo recites its version of the evidence, in disregard of the jury verdict and judgment against Volvo, and of the rule that Reeder "must be given the benefit of every legitimate inference that can be drawn from the evidence." 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2528, at 288 (2d ed. 1995); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213 (1993). The evidence that the jury was entitled to credit tells a vastly different story.

1. *Reeder-Simco.* Reeder is a dealer of new and used commercial trucks in Fort Smith, Arkansas, which sits on a major interstate highway system. Tr. at 8. Reeder had a long track record of successfully selling Class 8 trucks for Volvo's predecessor companies, and indeed in 1992 was honored with Volvo GM Truck's "second to none" award for top dealers for performance in 1992. Tr. 10-11, 14-15; JA 120 (272 trucks sold in 1992). Reeder also exceeded its manufacturer-set Class 8 sales objectives by almost 50% in 1994. JA 50.

In 1995, after Volvo ended its joint venture with GM and assumed sole control of its heavy-truck business, Reeder en-

tered into a new franchise agreement. Tr. 15-17. This agreement was for an automatically renewing five-year period, and Volvo could only terminate the agreement for cause. JA 436-37. The agreement assigned Reeder an area of responsibility around Fort Smith where Volvo would not locate another dealer, JA 432-33, 449, but this was not an exclusive sales territory. Volvo dealers are free to sell anywhere in the continental United States, and Reeder has sold trucks in many states. JA 13-14. Reeder was obliged to comply with a Portfolio of Criteria (which included annual sales objectives, part purchase objectives, working capital requirements, etc.). JA 10-12, 433, 440. Reeder had no franchise agreement with any other Class 8 manufacturer, see Tr. 8, and thus sold Volvo trucks exclusively in the Class 8 market.

During the time period relevant to this case, there were 146 authorized Volvo dealers in North America and 169 dealership points (since some dealers owned more than one dealership). JA 457. Reeder was in District 52 of Volvo's Southwest Region. CA8 JA 364-65.

2. *Dealer Competition For Class 8 Sales.* Dealer competition for Class 8 sales is a multi-stage process. The first stage is to "establish the relationship [with] the customer so that they would ask you to give them a price." JA 14. There are myriad ways in which dealers like Reeder compete to develop customer relationships and opportunities to pitch new truck sales. Dealers cultivate existing accounts to whom they previously had sold trucks. See, *e.g.*, JA 77, 104. As Reeder's experience attests, dealers also generate customer relationships from servicing Volvo trucks sold by other dealers. This competition is not limited to local customers. Larger trucking fleets often maintain terminals in different states, and dealers build relationships by servicing trucks in those terminals. JA 89, 104, 358, 477. Sales opportunities also arise when interstate truckers need road service. JA 174. Quality service requires investment. Tr. 11-12. Dealers also generate new opportunities from aggressive sales and marketing to potential

new accounts, which require investment in the sales force and in solicitations. See, *e.g.*, JA 42 (hiring of additional salesmen), 77, 104, 190, 208, 228, 239 (discussing sales efforts to new accounts by Reeder), 432-33 (franchise terms requiring vigorous and aggressive promotion and solicitation); Tr. 354 (Reeder "salesmen would go up to a truckstop [to] try to make some sales to individual owner-operators"), 791 (Class 8 sales require active selling). Dealers invest in attractive and well-located dealership locations and merchandising of Volvo trucks. Tr. 12, JA 42. "The evidence show[ed] that an end user's decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation and cold calling or other marketing strategies initiated by individual dealers." Pet. App. 28a-29a.

Once a relationship is formed and an opportunity to quote trucks is obtained, the next stage of the competitive process is to develop product specifications with the customer. JA 14. The dealer invests time and resources to determine customer needs, matching them with Volvo products, and convincing customers that Volvo trucks fit their business needs better than competitors' trucks. JA 14-15, 220, 244-45, 434-35.

The third stage in the process, once the initial product is specified, is to negotiate an effective wholesale price for the proposed truck order from Volvo, a process described in more depth below. JA 15. Once Volvo specifies the price it will charge the dealer for the desired trucks, the dealer then determines the retail price it will offer the customer, taking into account all costs and its own profit requirements. *Id.* This may be an iterative process, whereby the dealer works with the customer to reconfigure the order to cut the price. JA 126. If the customer accepts the deal, the dealer purchases the trucks from Volvo for resale (unless it sells all or part of the order from inventory).

3. *Competition Between Volvo Dealers.* The undisputed evidence from trial, from Reeder and Volvo witnesses alike,

is that Reeder Simco competes with other Volvo dealers in Volvo's multistate Southwest Region. All Volvo dealers offer the same products to the same customer base, and the customer is free to select any Volvo dealer. JA 175. Customers are mobile, interstate highways run throughout the region, and there are no physical or trade barriers to selling into other dealer's areas. JA 175-76. Success as a dealer does not depend principally on geographical location. Tr. 581, 587. Reeder sold and delivered trucks to every State in the Southwest region except for two. JA 175.

Volvo dealers compete at every stage of the sales process. William Heck, a co-owner of Reeder involved in Class 8 sales, testified that Reeder Simco competes with other Volvo dealers, noting that "[w]e operate on the same customers," and "many times" customers would check Reeder prices with other dealers. JA 174. A Volvo executive testified that "we frequently find ourselves in situations where customers, because these customers are very mobile, will go to two or three different dealerships" in seeking price quotes for a Volvo truck. JA 412. As a Volvo witness summed it up: "Q: Okay. So there's a competition among the Volvo dealers within various districts? A: Districts and Regions, yes, sir." Tr. 588.

4. *Volvo's Pricing Scheme.* Despite Volvo's rhetoric of pro-consumer "discounting" to meet competition, Petr. Br. 24, Volvo's pricing practices are simply a form of haggling designed to extract the *highest* possible price from a given retail truck customer and to control, on a case-by-case basis, the respective shares of any profit that Volvo and a particular dealer may receive on a transaction.

Volvo sets a retail list price for base model trucks and product options, and a dealer (wholesale) list price at 80% of the retail list price. JA 14. These are artificial prices; often, if not always, the *dealer* list price exceeds the market *retail* prices that the consumers actually pay. Volvo's true wholesale price to a dealer is determined by its practice of granting "concessions" (also known as retail sales allowances, or

RSA), in the form of an additional percentage reduction in price off the 80% dealer list price. JA 14-15. District managers may grant concessions within ranges set by truck type and order quantity according to a matrix; more senior regional executives may approve additional concessions. JA 83-84.

Those concessions are not generally granted to meet competitive "bids" to another customer, as Volvo implies; indeed, Volvo conceded at trial that it knew the actual prices competitors were offering to customers only in 10-15% of its transactions. JA 428. In most transactions, Volvo simply had a general sense of market prices for competitive trucks that the customer might be considering and factors (not protected by the RPA) that might allow Volvo to charge certain customers higher prices. JA 355-56. By its own admission, the purpose of the concession methodology is to "allow[] Volvo to sell at a higher profit to someone who will pay more." JA 343; *see also* JA 339 ("we've got customers we don't have to go as deeply to maintain"), 87 (Volvo admission that the concession methodology is designed to protect its gross profit); see NADA Br. 8, 25 (discussing switching costs of existing Volvo customers). This pricing scheme also allows Volvo (particularly in a boom market where it was operating at or near full capacity) to manipulate the profits its different dealers receive, and to determine which dealers would get the favorable prices necessary to close deals.

By its very nature, then, Volvo's pricing methodology envisions price discrimination among its dealers. Price discrimination under the RPA is defined as a difference in price to different purchasers for commodities of like kind and quality. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). Volvo witnesses repeatedly acknowledged that its concession methodology effectively resulted in such disparities. JA 411 (methodology "result[s] in a disparity in price between dealers in a substantially similar transaction"), 343 (Volvo does not equalize concessions on similar deals if end user is different). Volvo claimed to follow a policy of nondiscrimination in

the narrow circumstance of two Volvo dealers seeking concessions at the same time to sell trucks to the same end-user, but the evidence (discussed below) showed that even that policy was not executed. JA 80-81.

5. *Volvo's Discrimination Against Reeder.* The evidence at trial showed that Volvo systematically practiced massive price discrimination against Reeder, and indeed did so pursuant to an express corporate policy to eliminate half the dealer force competing to sell Volvo trucks.

In the period relevant to this case, Volvo adopted a policy called "Volvo Vision" to eliminate smaller dealers. JA 457. Volvo's goal was to boost the number of dealership points to a slightly higher level, but to reduce the number of dealers by roughly 50% (from 146 to 75), with some dealers operating multiple dealerships over "larger markets." *Id.*; JA 33-39, 402-03, 452 ("50% of Volvo truck dealers would not be in business in the next few years.").

The jury was entitled to infer that price discrimination was a tool by which Volvo pursued its goal of driving half of its dealers out of the Volvo truck business. Pet. App. 16a. Volvo was constrained by its self-renewing franchise agreement, which prevented termination of the franchise except for cause, from simply refusing to deal with a targeted dealer. Moreover, even aside from Volvo's binding and voluntary contractual commitments, federal and state law both prohibit termination of dealerships without cause. 15 U.S.C. § 1222; Ark. Code Ann. § 4-72-204(a). Volvo, however, could terminate dealers for failing to make their sales and other objectives. JA 450-51. Moreover, Volvo admitted that its plan for executing "Volvo Vision" was for better-performing dealers to swallow lower-performing dealers. JA 403. Price discrimination that lowers the value of targeted dealerships by depriving the targeted dealers of sales, or reducing their profit on the sales they did make, makes them ripe for the plucking. Thus, price discrimination was a powerful way for Volvo to

manufacture "cause" to terminate unwanted dealers, or to hasten their acquisition by preferred dealers.

Notwithstanding the jury verdict against it, Volvo asks this Court to infer that Volvo had no motivation to pursue such a plan because it could not "possibly benefit by reducing the competitiveness of its dealers," citing general economic nostrums that a manufacturer benefits from greater competition among its distributors. Petr. Br. 42. Even as a general proposition, this claim flies in the face of a long history of "abusive and oppressive acts by manufacturers" against dealers they deem "'expendable.'" *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 100-01 & n.4 (1978). "The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory." *Id.* at 100 n.4 (quoting S. Rep. No. 84-2073, at 2 (1956), establishing Automobile Dealer Day In Court law for auto and truck dealers, 15 U.S.C. §§ 1221-1225). But cases are decided on their facts, not abstract propositions. Here, the Volvo Vision was pursued during years of "banner," even "record," sales for Volvo and the Class 8 truck industry at large. JA 256-57, 378, 400-01. Volvo was operating at or near full capacity in this period, with long delays in building and delivering trucks. JA 256-57. In a boom market with an abundance of orders, Volvo could readily pursue longer-term profits from realigning its dealer network. Given its capacity constraints, Volvo could reach its sales objectives by steering sales to some dealers by giving them reasonable prices, while at times charging high prices to disfavored dealers that would either (1) prevent those dealers from making sales objectives, thus exposing them to termination or acquisition, or (2) result in sales at much higher profit margins for Volvo. It should be noted that while *retail* truck prices are set competitively, Volvo is a monopolist in the *wholesale* market in selling to dealers like

Reeder who have no other franchise that allows them to tap an alternative Class 8 supplier. When Volvo sets a high wholesale price at the concession stage, it has the dealer over a barrel. The dealer's expenditures in acquiring the customer and negotiating the purchase are largely sunk by the time a price is quoted, and a dealer may be willing to shave its profit margin to the bone to secure the sale (especially if its entire franchise investment is at risk if it fails to meet sales objectives). JA 55, 140, 194, 272-73, 423. A manufacturer who deems a dealer "'expendable,'" *New Motor*, 468 U.S. at 100 n.4, and controls dealer profit as Volvo does, has no incentive to insure that such a dealer earns a fair profit.

The evidence showed that Volvo pursued its Vision with a vengeance. Even in a boom market, Volvo issued 20 termination letters and placed another 20 or so on probation in 1999-2000 alone. Pet. App. 16a. That was more than a quarter of the existing Volvo dealer force, and about 60% of the 71 dealers targeted for elimination. See JA 457.

More particularly, this policy was pursued with a vengeance against Reeder. The evidence revealed that Volvo's Southwest Region Vice-President had marked Reeder as "not a long-term dealer." JA 359. After learning of the Volvo Vision, Reeder had resolved to "take whatever steps necessary to survive." JA 42. It invested in a new and more desirable dealership location for Class 8 truck sales and inventory, and hired additional salespeople. It aggressively sought sales from old and new accounts. JA 42, 77, 190, 208, 228, 239. Reeder steadily increased the number of customers that it brought to the point of a price quote, succeeding in quoting potential sales of 3,726 trucks from 1997 to 1999. JA 78-79. Volvo's rate of quotes to sales in Reeder's region is 3 to 1, JA 118, which would suggest such efforts would yield sales of many hundreds of trucks. Nonetheless, despite Reeder's historically strong performance as a Class 8 dealer (which continued as late as 1996), Tr. 10-11, 14-15; JA 50, 67, and its aggressive pursuit of sales in a boom market, Reeder's sales

and profits nosedived. It sold only 34 trucks in 1998, 18 in 1999, and 8 in 2000, and by 2000 its annual gross profit dwindled to as low as $26,000. JA 473. Reeder was reduced from "second to none" top dealer status to one of the worst performing dealers in the Volvo system for 1997 to 1999, and was issued a termination letter in 1999. JA 373-79.

The jury was entitled to find that one reason was price discrimination. Tellingly, Volvo runs from the facts of the discrimination on Reeder's actual purchases, giving as an "example" only the facts of the smallest deal with a relatively small discrimination. Petr. Br. 5. In truth, Reeder proved massive discrimination just in the so-called "sales-to-sales" comparisons with other competing Southwest Region dealers: namely, that Volvo engaged in price discrimination on 102 trucks that Reeder purchased for resale from 1996 to 1998, and that the discrimination on those purchases amounted to $281,965.[2] The discrimination occurred on more than 55% of Reeder's purchases for resale during all of the 1996 to 1998 period, and far exceeded Reeder's total annual gross profits on Class 8 sales in any year during that period. JA 473.

Reeder also put on evidence of another 14 transactions (involving potential sales of another 1373 trucks) where Volvo discriminatorily denied Reeder the price at which it *sold* comparable trucks to other competing Southwest Region dealers, and Reeder was unable to close the deal with its cus-

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[2] *See* JA 134 (20 trucks sold to Lane Freight with discrimination of $2,606 per unit, totaling $52,120); JA 141-43 (2 trucks sold to Fort Smith with discrimination of $1,275 per unit, amounting to $2,550); JA 156 (77 trucks sold to New Hi-way Express with discrimination of $2,499 per unit, amounting to $192,423); JA 160-61 (3 trucks sold to Sam Ludington with discrimination of $11,624 per unit, amounting to $34,872). The discrimination was actually greater because Reeder itself was forced to buy for inventory at a discriminatory price 4 of the 8 trucks that New Hi-way Express cancelled out of an original order of 85 trucks. Indeed, Volvo raised the final wholesale price on those 4 trucks when they were resold, even though it did not do that to other dealers. JA 383-90.

tomer in bidding retail prices above the discriminatory wholesale price. JA 19-26, 89-94, 189-251.

In one of those transactions, despite a stated policy to the contrary, Volvo discriminated against Reeder in a transaction (Hiland Dairy) when Reeder was competing head-to-head with another Volvo dealer for a sale to the exact same customer. Volvo and the Government try to spin the evidence in Volvo's favor, but the jury was entitled to reject Volvo's version of events. The evidence showed that in January 1999, Volvo granted another Volvo dealer, Southwest Missouri Truck Center (SMTC), a 7.5% concession, on a bid to sell trucks to Hiland Dairy (a large private carrier). JA 352. Hiland Dairy did not accept the bid, and subsequently asked Reeder (which services Hiland Dairy's trucks in Fort Smith) to bid on the deal. JA 89. Reeder asked for a price concession of 12%, but on July 21, 1999 was granted the same concession of 7.5% off the January list price granted to SMTC six months earlier. JA 90, 362. Even with the same concession, the dealer net price Volvo quoted to Reeder was actually higher than that quoted six months earlier to SMTC because there had been an intervening 1.3% price increase on that model of trucks. JA 477.

Less than a month later, SMTC reported that Hiland Dairy was willing to buy at the price SMTC had quoted in January 1999, but now SMTC sought a higher concession to maintain its profit in light of the intervening price rise. JA 353. On or prior to August 19, 2001, Volvo granted the higher concession of 8.5% to SMTC, but never offered the same concession to Reeder. JA 364. Two days later, on August 21, 2005, SMTC placed the order to purchase the trucks for resale to Hiland Dairy. JA 91. Contrary to the claims of Volvo (Br. 29) and the Government (Br. 5), there was no evidence that Hiland Dairy (which had a longstanding relationship with both dealers) preferred to buy from Reeder or SMTC on any basis other than price. A Volvo witness testified that he did not give the same concession to the Reeder because "the order

had already come in" and "[i]t was a done deal." JA 353. But the jury heard evidence that the same District Manager did not grant concessions simply because the customer had agreed to a price, JA 19-26, 139-41, and his representations were refuted by the record (the concession was granted two days before the order). In any event the jury was entitled to disbelieve the Volvo's witness's characterization of events in favor of the plausible reason that Hiland Dairy chose SMTC because it was able (as a result of discrimination) to offer a better price. See *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (evidence supporting movant for JMOL considered only if "'from disinterested witnesses'"). The loss of the Hiland Dairy sale alone cost Reeder $30,000 in gross profit. JA 100.[3]

Moreover, the repeated claim by Volvo and the Government that Volvo never deviated from its policy of granting the same concession to each dealer bidding for the same customer is belied by other record evidence. In May 1998, Volvo granted a concession to Reeder that was much lower than a concession to another Volvo dealer (Volvo GMC Trucks) for an order to the exact same customer (TSL) just two weeks earlier. JA 212-19. Volvo and the Government wholly ignore this evidence of patent discrimination in head-to-head bids. Indeed, Volvo did not have a computerized system to check if concession requests from different dealers related to the same customer until 2000. JA 427-28. Before then, execution of the policy occurred only if the district manager knew of another dealer quote and adhered to the policy. JA 428. The jury was entitled to find that Volvo did not strictly follow even its limited nondiscrimination policy, and simply implemented its "Volvo Vision." JA 81.

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[3] There is also no evidence supporting Volvo's claim that it was at risk of losing the deal if it had given Reeder the chance to bid for the sale with an 8.5% concession. Petr. Br. 28-29. Volvo could have notified Reeder on August 19 or at anytime before the order was placed two days later.

D. *Proceedings Below.*

Reeder sued Volvo for price discrimination under the RPA, as well as for violating the Arkansas Franchise Practices Act. After trial, the jury returned a verdict in favor of Reeder on both claims. On special interrogatories for the RPA claim, the jury answered affirmatively that it found (1) "that, when comparing the reasonably contemporaneous sales of trucks of like grade and quality, Defendant charged different prices to different purchasers in the sales transactions"; (2) "that there is a reasonable possibility that discriminatory pricing may harm competition between plaintiff and other retail dealers of Volvo trucks"; and (3) "that Plaintiff was injured in its business or property because of the Defendant's discriminatory pricing." Pet. App. 37a-38a. The jury awarded Reeder $1,358,000 in damages for the Robinson-Patman Act violations. Volvo's motion for judgment notwithstanding the verdict was denied by the district court.

The United States Court of Appeals for the Eighth Circuit affirmed that ruling. The court held that Reeder had shown that it had purchased commodities at a discriminatory price by presenting evidence of the sales-to-sales comparisons for the 102 trucks. Pet. App. 10a. Reeder further showed that it was in actual competition with the favored purchasers because they competed for sales at the same functional level in the same geographic market. *Id.* at 11a-12a.

The court also held that Reeder proved a reasonable possibility of competitive injury from Volvo's unlawful discrimination. Pet. App. 15a-16a. The court noted that, under *Morton Salt*, the jury could infer competitive injury if the "plaintiff [shows] that the favored competitor received a substantial price reduction over a substantial period of time." *Id.* at 15a (internal quotation marks omitted). The court noted that the jury had been shown ample evidence of lost profits and sales attributable to the discrimination at a time when the sales of Volvo and favored dealers were strong. *Id.* at 15a-16a. The court concluded that the *Morton Salt* inference was justified

on Reeder's evidence because Volvo's discrimination lasted for several years, and, because Reeder showed that "dealer profit margins were narrow," the jury "could reasonably conclude even small differences in price concessions had a substantial impact on competition." *Id.* at 16a-17a.

The court also held that Reeder proved actual injury from Volvo's price discrimination. Pet. App. 17a. "Reeder presented evidence that its own sales and profits were substantially reduced during this boom in the heavy truck industry, despite an increase in its own sales efforts," and that the jury was entitled to infer that Volvo used discrimination as a means of reducing the number of dealers selling its trucks. *Id.* at 18a. Such evidence was "precisely the type of injury the antitrust laws were meant to prevent." *Id.* at 19a. Reeder was not required to show that Volvo's misconduct was the sole cause of its injury, nor was it required to limit its proof regarding antitrust injury to the sales-to-sales comparisons. *Id.* at 19a-20a. Judge Hansen dissented. *Id.* at 27a-32a.

SUMMARY OF THE ARGUMENT

Section 2(a) of the RPA prohibits price discrimination among different purchasers of commodities of like kind and quality where the effect of the discrimination may be to injure, destroy, or prevent competition with favored purchasers. Volvo engaged in massive price discrimination, exceeding $280,000, on the *purchase* for resale of 102 trucks by Reeder from 1996 to 1998, as well on a number of other transactions where the price discrimination prohibited Reeder from making such purchases. Volvo did so pursuant to an overt company policy to eliminate small dealers from its force. The jury found that Volvo's discrimination created both a reasonable possibility of injury to Reeder's competition with favored Volvo dealers and actual injury.

Volvo asks this Court to disregard the 102 discriminatory sales on a novel and unprecedented transactional theory of "competition" under the RPA. According to Volvo and its

amici, adopting the position of the dissenting judge below, "[o]nce bidding begins, . . . the relevant market becomes limited to the needs and demands of a particular end user," and actual competition exists only among rivals bidding at that stage. Pet. App. 28a-29a. But "competition" under the RPA or any antitrust law is not defined on a transactional basis. This Court (along with the FTC, lower courts, and commentators) has long defined competition as the vying for customers in the same relevant market. The "relevant market," and the existence of competition within that market, do not shift or shrink with the vagaries of a specific customer's shopping choices. Thus, the RPA can be violated if there is a reasonable possibility of injury to competition with favored purchasers in the market, not just in specific transactions. Courts, the FTC, and scholars have universally recognized that not only price advantage but also significant impairment of profit margin (even in the absence of resale price competition) creates a reasonable possibility of competitive injury so defined. Accordingly, an RPA violation may be inferred merely from evidence that "manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948). The jury was instructed under *Morton Salt* and so found.

In the alternative, Volvo and its amici attack this Court's interpretations of the RPA as protecting the individual competition of merchants with their rivals from injury, arguing that the *Morton Salt* inference may be drawn only if discrimination favors a competing purchaser with buyer power (and thus threatens intrabrand competition). That argument is waived; Volvo did not object to (and indeed proposed) the *Morton Salt* jury instruction, and never sought an instruction regarding the buyer power of the favored purchaser. Regardless, this Court has repeatedly rejected Volvo's buyer power argument; *stare decisis* has particular force in statutory cases; and Volvo's arguments cannot be squared with the statutory text. The Act plainly outlaws discrimination that may injure the

plaintiff's "competition with" favored customers of the seller, without limitation. The FTC has squarely rejected Volvo's theory that competitive injury must be shown in relation to knowing recipients of discrimination; even if such a scienter requirement existed (a claim Volvo did not preserve at trial), it would not support Volvo's buyer power limitation on *Morton Salt*. This Court should resist Volvo's call for a judicial rewrite of the RPA.

Volvo's second question – whether RPA antitrust injury may be based solely on "an unaccepted offer," Petr. Br. (i) – is not presented, because it falsely assumes that the discriminatory 102 truck *sales* to Reeder do not violate the Act. Reeder clearly proved antitrust injury from those violations (including the classic RPA proof sanctioned by this Court of lost sales and profits relative to estimates of sales and profits absent a violation). Reeder showed that Volvo's anticompetitive conduct in violation of the Act was a material cause in part of its losses, which is all the antitrust injury doctrine compels. Nor is Volvo correct that the jury was forbidden to consider transactions where Volvo's discriminations deprived Reeder of the ability to purchase, or that refuted Volvo's contentions that poor performance and bad luck rather than its violations of the Act caused Reeder's precipitous loss of sales and profits. The fact of injury was simply a question for the jury.

ARGUMENT

Section 2(a) of the RPA makes it unlawful to 1) "discriminate in price" between 2) "different purchasers" of 3) "commodities of like grade and quality" 4) sold in interstate commerce where 5) the effect of the discrimination "may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a); *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 556 (1990). Upon proof of these elements, a violation of § 2(a) exists

unless the defendant establishes one of the RPA's affirmative defenses. *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983). In a private damages action, a plaintiff must also make "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); 15 U.S.C. § 15.

Here, Reeder proved all the elements of an RPA damages action – including indisputably that it was a "purchaser" of 102 trucks where Volvo's price discrimination exceeded $280,000. Volvo does not contest in this Court the jury's verdict that Volvo discriminated in price on commodities of like grade and quality in all the transactions at issue, and did not prove the statutory defense of meeting competition. Pet. App. 37a-38a. Instead, Volvo claims that the evidence is insufficient to show a reasonable possibility of competitive injury from discrimination on the trucks Reeder purchased because (1) Reeder is not in competition with favored Volvo dealers unless another dealer bids on the same sale to the same customer, and (2) this Court should overrule *Morton Salt* and condition liability on findings of market power of favored competitors and harm to "intrabrand" competition. Volvo also contends that Reeder did not prove antitrust injury, and that transactions in which its price discrimination deprived Reeder-Simco of a sale must be excluded from the jury's calculus. None of those arguments has merit.

I. THE JURY WAS ENTITLED TO FIND A REASONABLE POSSIBILITY OF COMPETITIVE INJURY FROM VOLVO'S DISCRIMINATION.

A. Competition Under The RPA Is Defined By Whether Rivals Serve The Same Market, Not On A Transactional Basis.

In outlawing price discrimination the effect of which "may be . . . to injure, destroy, or prevent competition with" specified rivals, 15 U.S.C. § 13(a), the RPA is "designed to reach such discriminations 'in their incipiency,' before the harm to

competition is effected." *Corn Prods. Refining Co.* v. *FTC*, 324 U.S. 726, 738 (1945). "[T]he statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Id.* at 742. Thus, an RPA violation may be inferred merely from evidence that "manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948); *Falls City*, 460 U.S. at 435.

Volvo and the Government contend that the jury could not find a reasonable possibility of competitive injury as a matter of law from Volvo's massive price discrimination of $281,965 on the sales of 102 trucks to Reeder from 1996 to 1998 because such discrimination could not affect actual competition among Volvo dealers. According to their theory (shared by the dissenting judge below), the "relevant market" for purposes of defining competition shrinks according to the stages of the transaction with a specific customer:

> As Judge Hansen pointed out, although Volvo dealers may "have competed against each other" in a market to "receive the opportunity to bid on potential sales to customers" in a broad geographic area, "[o]nce bidding begins, *** the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale."

U.S. Br. 21 (alteration and omission in original) (quoting Pet. App. 28a-29a); Petr. Br. 10-11, 19 (arguing that Reeder "fail[ed] to prove *competition* – an essential element of Reeder's RPA claim" on the sales-to-sales comparisons "for the simple reason that Reeder did not compete *in any of these transactions* against another Volvo dealer") (second emphasis added); Petr. Br. 30 (injury must relate "to *the transactions* in which there is competition between favored and disfavored purchasers.") (emphasis added).

The definition of "competition" espoused by Volvo and the Government is contrary to the plain meaning of that term in the RPA and the antitrust laws generally (an irony, considering their repeated urgings elsewhere in their briefs to interpret the RPA consistently with other antitrust laws). This Court has long held that firms are in "competition" when they are vying for the same customers in the same relevant product and geographic market. *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (Dealers are in "effective competition" if "the purchaser can practicably turn for supplies" to those dealers in "the market area in which the seller operates"); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963); *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, 388 (1923) ("competition" is "the play of the contending forces ordinarily engendered by an honest desire for gain").

This Court has applied the same standard under the RPA, finding that favored and disfavored purchasers are in "competition" at the same functional level so long as they offer the same products to customers in the same geographical market. *Falls City*, 460 U.S. at 436 (beer wholesalers compete because they both sell the same products "in a single, interstate retail market"); *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 62 (1959) (agreeing with the court of appeals that variety and fabric stores compete because they "'retail[] the identical product to substantially the same segment of the public'"); *Texaco*, 496 U.S. at 548; *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 526-27 (1963). So has the FTC. *E.g.*, *Sun Oil*, 55 F.T.C. 955, 976 (1959) (finding competition among dealers "operating at a small margin of profit and *in an area which was a reservoir of potential customers* who, because of the geographic situation, had easy access to that dealer who offered an advantage in price or in services rendered") (emphasis added); *P&D Mfg.*, 52 F.T.C. 1155, 1169-70 (1956). Thus, as the court held below, "'The standard for showing actual competition is whether, 'as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same

functional level, i.e., all wholesalers or all retailers, and within the same geographic market.'" Pet. App. 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)); 3 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 39.02[2] (2d ed. 2004).

The "relevant market," and the existence of competition within that market, do not shift or shrink with the vagaries of a specific customer's shopping choices. "Competition" under the RPA and other antitrust laws is simply not defined on a transactional, or customer-specific, basis. As Professor Hovenkamp states, "[i]n determining that the favored and disfavored purchasers are 'competitors'" under the RPA, courts look to factors "for defining relevant geographic and product markets," and "[a]s a general matter, it need be shown only that the two sellers compete for the same customers." 14 H. Hovenkamp, *Antitrust Law* ¶ 2333b, at 89-90 (1999) (footnotes omitted).[4]

B. A Jury May Find An RPA Violation When The Probable Future Effect Of Price Discrimination Is To Injure, Destroy, Or Prevent Competition With Favored Purchasers In The Same Market.

Volvo and the Government advance their contrived transactional definition of "competition" to argue that *ipso facto* there can be no cognizable injury to competition except as to those competitors directly bidding against Reeder in the specific resale transaction. That claim cannot be squared with the language or history of the RPA. The predecessor § 2 of Clayton Act banned price discrimination the effects of which "*may be* to substantially lessen competition . . . in any line of commerce," a usage that was repeated in other parts of the

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[4] The relevant market inquiry for secondary-line RPA claims (where the products are essentially the same) is simpler than under other antitrust laws because certain factors relevant to the definition of product markets – such as the ability of a competitor to set prices above competitive levels – are "unnecessary" to the RPA inquiry. 14 Hovenkamp, *supra*, ¶ 2333b, at 90.

Clayton Act. *See, e.g.*, 15 U.S.C. §§ 14 (agreements not to use or deal in competitors goods), 18 (mergers). This Court has interpreted this "may be to" language to involve a "prognosis of the probable *future* effect" of the proscribed activity on the entire process of competition in the relevant market. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 332 (1962).

The RPA broadened the Clayton Act's prophylaxis against price discrimination to encompass two different kinds of competitive injury. It retained the original protection against the reasonable possibility of a substantial lessening of competition "in any line of commerce," which requires analysis of "'general injury to competitive conditions'" in the relevant market as a whole. *Morton Salt*, 334 U.S. at 49. But it also outlawed price discrimination where the effect "may be . . . to injure, destroy, or prevent competition *with*" specified rivals. 15 U.S.C. § 13(a) (emphasis added). The RPA thus protects individualized competition of the victim of discrimination with favored rivals in the same geographical market, and a violation may be proven whenever the jury finds a "probable *future* effect" of injuring, destroying, or preventing the victim's competition in that market. *Brown Shoe*, 370 U.S. at 332. There is nothing in the text of the RPA that limits the reasonable possibility of injury to competition to a single resale transaction and only to those competitors who happen to be bidding for a specific customer's business.

To the contrary, the transactional definition of "competition" cannot be squared with the language of section 2(a) in any regard. First, if competition is defined by who is already competing in a specific transaction, then price discrimination could never "prevent" competition. The "prevent" prong of the second clause of section 2(a) is aimed at the future probable effect on competition in the market, where discrimination may drive the victim out of the business of selling the supplier's commodities. Second, Volvo's narrow theory of RPA competition is belied by the Act's broad, express prohibition of discrimination with regard to "commodities . . . sold

for *use, consumption, or resale* within the United States." 15 U.S.C. § 13(a) (emphasis added). The RPA is concerned with any way in which price discrimination among competing purchasers may affect the terms of future competition in the market. See *Corn Prods.*, 324 U.S. at 739-42 (price discrimination in important raw material input violates the RPA).

In this respect, it is ironic that Volvo block-quotes a passage on competitive injury from the Hovenkamp treatise, Petr. Br. 16, which (as noted above) supports Reeder on this point. Professor Hovenkamp rightly states that "[t]he disfavored purchaser must be injured in its *ability to compete* with the favored purchaser," and then points out that such an inference cannot be made if two dealers do not compete *in the same market*, giving as an example Michigan and Georgia automobile dealers who "each operate in their own geographic areas and never compete with each other for sales to the same customers." 14 Hovenkamp, *supra* ¶ 2333b (emphasis added). The existence of actual competition depends on whether the favored and disfavored customers vie for customers in the same market, not on whether they do so in a single customer transaction.[5]

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[5] Although based on a flawed legal interpretation of the "competition" protected by the RPA, the repeated claim by Volvo and the Government that Reeder competed head-to-head only two or three times with other Volvo dealers is based on a wholesale mischaracterization of the testimony of Reeder co-owner William Heck. Responding to questions about competing with Volvo dealers on concession quotes "that you have actually worked on that you've already testified about," Heck testified that there were "two [or] three" occasions "where I knew . . . at the same exact time" that another Volvo dealer was also competing for the same sale. JA 305. First, Heck (who specializes in fleet sales, JA 358), was not testifying as to the entirety of Reeder's Class 8 deals. His answer did not cover deals that were not the subject of his prior testimony (all of which dealt with specific cases where Volvo gave discriminatory prices), nor (because the questions pertained to quotes Heck had "actually worked on") did he testify about the quotes that other Reeder Simco salesmen had requested from Volvo. *See, e.g.*, JA 77, 228, 239, 364. Second, Heck was careful to limit his answer to instances where he had personal knowledge of another Volvo dealer "at the same exact time" he sought a quote be-

Accordingly, courts have long held that juries are entitled to infer an injury to competition under the Act whenever the discrimination causes one purchaser to suffer substantially lower profit margins than another. *See, e.g., Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674, 680 (5th Cir. 1965) ("[A] substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give[] him a substantial advantage over his competition."). A reasonable possibility of competitive injury is not limited to only that circumstance where a sale (and concomitant profits) may be diverted to the favored customer; "reduction in [profit] margin has also been found to be the kind of injury contemplated in the statute's conception of injury to competition with the favored purchaser," and thus, "simply making a lower markup than one's rivals is the kind of injury contemplated by the statute." 14 Hovenkamp, *supra* ¶ 2333c, at 104. As the conference manager of the RPA pointed out, price discrimination can affect not only competition to resell the goods purchased at discriminatory prices, but also may affect the victim's *future* competition for sales in the same market. Discrimination may be injurious where "the two are competing in the resale of the goods concerned," but "[w]here, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices *to his other customers*." 80 Cong.

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cause there are many occasions where a dealer does not know with whom the customer is negotiating, unless the customer discloses it. Third, in addition to the three bids about which Heck testified, a Volvo witness testified that "[t]ypically [Reeder] would compete with the dealer in Springdale, Arkansas" on deals, implying many more than one with that dealer alone. JA 348. Construed in Reeder's favor, this testimony does not have the meaning Volvo and the Government assign it.

Rec. 9413, 9416 (1936) (remarks of Rep. Utterback) (emphasis added).[6]

There are myriad ways in which lower profit margins from substantial discrimination impair the victim's ability to compete with favored purchasers in the market. Relative deprivation of profits compromises the ability of the dealer to offer competitive *retail* prices (or inducements in trade or financing) in future competition. In some transactions, dealers will set low retail prices that forgo profits or even cause them losses in order, for example, to get a new customer account or maintain existing customer relationships so as to ensure future sales and longer-term profits. See JA 194, 423. A dealer who has suffered substantial price discrimination on prior purchases has less wherewithal to compete on retail price in future transactions. Moreover, a favored purchaser who receives higher profit margin can "offer customer-attracting services which will give him a substantial advantage over his competition." *Foremost Dairies*, 348 F.2d at 680; see, *e.g.*, *Alan's of Atlanta, Inc.* v. *Minolta Corp.*, 903 F.2d 1414, 1426 n.18, 1427 (11th Cir. 1990) (holding that competitive and antitrust injury under the Robinson-Patman Act occurs when a competitor invests its relative advantage in profit margin in "advertising," "marketing," "enhanced service," and "promotion[]"). These concerns are acute in the Class 8 market where customer acquisition, relationships, and retention are at a premium, and competitive success depends on substantial investment in sales forces, marketing, and aftermarket service. *Supra* at 6-7.

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[6] *See also Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 386 (8th Cir. 1987) (finding "sufficient proof of competitive injury" where "Rose Confections did not lose a single sale" but its profit margins were lower than its competitors); *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir.) (discrimination "diminished its profits and helped destroy its financial ability to withstand competition."), *opinion modified on denial of rehg*, 190 F.2d 73 (5th Cir. 1951); *Ingram* v. *Phillips Petroleum Co.*, 259 F. Supp. 176, 182 (D.N.M. 1966) ("the loss of profits rather than the loss of sales" can injure competitors).

In support of its transactional theory, the Government suggests that competitive injury under section 2(a) requires some form of retail price adjustment (whereby either the sales are diverted to a favored purchaser who charges a lower retail price, or the disfavored dealer must lower his price to fend off competitors). U.S. Br. 22 & n.12. But courts have also long held that "profit impairment of resellers paying more for the product [is] competitive injury *even in the absence of resale price competition*." F. Rowe, *Price Discrimination Under The Robinson-Patman Act* § 8.4, at 183 (1962) (emphasis added; emphasis in original omitted). For example, even when both the favored and disfavored purchasers *always* resell the good at the exact same price (such as at the manufacturer's suggested retail price), the fact that the manufacturer sold the good to one at a higher wholesale price than another causes a "profit difference" between the purchasers that may ultimately injure the ability of the disfavored one to compete with the favored one. *E.g.*, *E. Edlemann & Co.* v. *FTC*, 239 F.2d 152, 155 (7th Cir. 1956). "It is not necessary that a price advantage be used to lower the resale price and thereby attract business away from nonfavored competitors. Sales are not the sole indicium that reflects the health of the competitive scene." *Id.*[7] Volvo's and the Government's preoccupation

[7] Indeed, the FTC itself (before its recent effective abdication of RPA enforcement) recognized this principle, especially in markets (like the Class 8 truck market) where competition is keen and profit margins are low. *See* 14 Hovenkamp, *supra* ¶ 2333c, at 105 & n.61 ("industrywide low profit margins may add to the inference of injury").

> Respondents contend that competition may not be adversely affected unless a price advantage to a buyer is reflected in the buyer's resale price, thus diverting business from non-favored buyers on the basis of price alone. This contention is not sound. Although there is no evidence in the record of any price-cutting by any of respondent's customers, the Commission and the courts have repeatedly pointed out that a price advantage may be used in many other ways to lessen competition.

American Ball Bearing Co., 57 F.T.C. 1259-60 (1960); *Joseph A. Kaplan & Sons, Inc.*, 63 F.T.C. 1308, 1342-43 (1963); *General Foods Corp.*, 52

with the fact that there was no evidence of price competition between Reeder and the other Volvo dealers in the bidding phase of Reeder's purchase of 102 trucks for resale is thus wholly irrelevant under section 2(a) to proof of a reasonable possibility of competitive injury from discrimination. Volvo's narrow transactional theory of competition offends not only the plain meaning of the RPA as interpreted by this Court, but also the rule that the RPA must be "construed liberally." *Abbott Labs.* v. *Portland Retail Druggists Ass'n*, 425 U.S. 1, 11 (1976).[8]

F.T.C. 798, 821 (1956); *Namsco, Inc.*, 49 F.T.C. 1161, 1161, 1169 (1953) ("Price competition is but one form of competition. Additional service to customers, additional salesmen to call on them, carrying a larger and more varied stock, branch houses, and proximity to customers – all aid respondent's customers to stay in business and to prosper. The institution or expansion of such competitive aids depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise purchased").

[8] As a factual matter, Volvo's claim that the 102 truck purchases by Reeder involved strictly "interbrand competition" is a false construct and unsupported by the record. First, there was no evidence one way or the other; it was simply not an element of Reeder's proof under section 2(a) to show whether another Volvo dealer was bidding for the same order. Reeder does not know if the customer is seeking bids from another Volvo dealer unless the customer (or the district manager, if he knows) discloses it, and Volvo successfully resisted Reeder's discovery into concession quotes to dealers where there was no sale to that dealer. Second, even if no other Volvo dealer has sought a concession quote at the same time, that does not mean that competition among Volvo dealers has been extinguished as to that transaction. The customer may at any time before purchase decide to turn to a second Volvo dealer – which is exactly what happened in the Hiland Dairy transaction. *Supra* at 14-15. Finally, despite Volvo's insistence that these sales involve "interbrand competition," there was no evidence as to any of the 102 sales that there was a dealer representing another manufacturer actively bidding for the deal. Although a customer may take competitive bids, sometimes the "competition" on a deal may mean nothing more than that the customer is aware of another company's price, or has previously bought from Navistar or Freightliner, and may turn to those companies if he decides against buying the Volvo truck. JA 19, 213. Under Volvo's definition of "competition" as limited to dealers engaged in the active bidding for a specific deal, in the common

C. Customer-Order Industries And Transactions Are Not Exempt From The RPA.

From the foregoing analysis, it should be clear that the distinctions that Volvo and the Government attempt to draw based on the *timing* of the wholesale purchase transaction in the heavy-duty truck industry (where the dealer typically purchases the truck for resale after the customer has placed an order), Petr. Br. 2; U.S. Br. 24, are irrelevant. Nothing in the text, history, or purpose of the RPA supports the distinction that Volvo and the Government would draw. The RPA looks to the "probable future effect" of discrimination on the victim's ongoing competition with favored purchasers in the market, and not solely to competition for a specific customer's business in a single resale transaction.

Their theory would also have the arbitrary effect of creating a blanket exemption from the RPA for all sales in any industry that are not from inventory. The Government is frank that this is the implication of its theory: (1) competition only exists among rivals bidding for a specific customer's order; (2) a dealer can purportedly only establish price discrimination by comparison to such a competitor, U.S. Br. 19-20 ("Because Reeder and the favored dealers were not competing for the same customers when they made their purchases, they were not 'different purchasers' in 'competition' with each other"); (3) where dealers are not attempting to sell to the customer from inventory, only one of those rivals will purchase the good to sell to the customer; (4) thus, there can never be an RPA violation, even where dealers are competing head to head. U.S. Br. 20 & n. 11.

The RPA does not privilege purchases for inventory. Heavy trucks are usually built to order, and not sold from inventory, because it would be prohibitively expensive for dealers to maintain the full product line in inventory. Petr. Br. 2. But application of the RPA does not depend upon the business model an industry adopts. The Act simply requires that the plaintiff show a difference in price charged "between different purchasers of commodities of like grade and quality," and some reasonable possibility of injury to its competition with favored rivals. 15 U.S.C. § 13(a).

There are any number of industries that secure at least some of their retail customers before they make their purchases from suppliers, and it would be arbitrary to exempt all of them from the RPA on the happenstance of inventory economics. For example, furniture dealers, carpet and flooring vendors, and booksellers maintain a limited showroom inventory while offering broader product choices by order from a factory or distributor; the latter wholesale purchases are made only after the customer places its order. Yet it would be fallacious to maintain that they are not in competition with other dealers of the same products in the same geographic market, simply because the customer has not chosen to shop with the other dealers, confer with them about product options, or solicit prices from them in the particular transaction. Even if there is no active competition at the ordering stage of a particular transaction, those businesses compete in the pre-order stages of customer acquisition in their own way just as truck dealers do in their industry, by investing in marketing, advertising, sales staff, and storefronts. Discrimination has the same anticompetitive effect in purchases for order or for inventory. The same is true in business-to-business markets (of which truck dealerships are one kind). A food service company that orders and resells food and beverage products to a business client in performing its contract may have no competition whatsoever in the specific resale transaction. Yet it is still in competition with other vendors in the food services market, and if a supplier engages in substantial price discrimination, the company may be harmed competitively in its market (because it will have less capital to invest in quality

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circumstance when a customer is only negotiating with a single Volvo dealer, the Volvo dealer would apparently be a monopolist in a market of one, Pet. App. 27a-28a, with neither intrabrand nor interbrand competition. That just further illustrates the absurdity of the conception of "competition" advanced by Volvo and the Government.

service, client acquisition, or competitive pricing on future bids). Not surprisingly, Volvo's theory has been rejected on the rare occasion when it has been raised. *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 137 (9th Cir. 1997) (table), *available at* 1997 WL 175062, at **3; *Industrial Burner Sys., Inc.* v. *Maxon Corp.*, 275 F. Supp. 2d 878, 883 n.15 (E.D. Mich. 2003).

Not only is it absurd to read the Act in a way that exempts industries from its reach on the happenstance of inventory management, but inventory practices are rapidly changing across many industries. With the advent of just-in-time manufacturing and e-commerce, retailers in many industries where there is diversity in customer demand for product features – from automobiles to personal computers to windows to furniture – are minimizing inventories (and the expense and risk that go along with them) in favor of build-to-order business models in which commodities are manufactured only once a customer has ordered them and selected which standardized components it wants.[9] It would be anomalous if entire industries (or competitors within industries) could escape the RPA simply by changing inventory practices. The Act makes no distinctions on the basis of inventory, and Congress did not limit its application solely to traditional patterns akin to the purchase of "commodities . . . for the shelves of the chain store and independent store across the street." U.S. Br.

[9] *See, e.g.*, A. Sharma & P. LaPlaca, *Marketing in the Emerging Era of Build-to-Order Manufacturing*, 34 Indus. Mktg. Mgmt. 476 (2005); *Pyrotechnics In Technology: Retail Industry Top Ten Issues 2004-2005* (2005) *at* http://www.deloitte.com/dtt/article/0,1002,sid%253D2240%2526cid%253D36273.html; D. Neel, *HP Introduces Build-To-Order Program For Consumer Laptops* (2001), *available at* http://archives.cnn.com/2001/TECH/ptech/10/10/hp.laptops.idg; D. Marino-Nachison, *Different Directions In PC Retail* (2001) *available at* http://www.fool.com/news/foolplate/2001/foolplate011008.htm; M. McGee, *Wake Up Call* (2000) (for automobile sales, "GM is moving to online build-to-order," where "its entrenched dealer network will still deliver the vehicles, and provide after-sale services"), *available at* http://www.informationweek.com/804/gegm.htm.

13.[10] "Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source." *Sun Oil Co.*, 371 U.S. at 520.

D. The Evidence Amply Supported The Jury Verdict Of Competitive Injury.

Because either significant pricing advantage *or* profit impairment from price discrimination may harm the victim's competition with favored purchasers in the same market, "[i]n *Morton Salt* this Court held that, for the purposes of § 2(a), [the] injury to competition is established . . . by proof of a substantial price discrimination between competing purchasers over time." *Falls City*, 460 U.S. at 435.

Here, the jury was instructed in accordance with *Morton Salt*. JA 480. If this Court rejects Volvo's transactional theory that there was no actual competition susceptible to injury as to the 102 truck sales as a matter of law, then this Court must affirm on the first question presented. The issue of competitive injury becomes one of fact, and Volvo raises no sufficiency challenge under the instructions as given.

The evidence amply supported the jury verdict. Each transaction involved discrimination in favor of other dealers in the Southwest Region. The testimony from both Reeder and Volvo witnesses was that all dealers in the Southwest region competed with each other for sales to the same customers. *Supra* at 7-8. Customers are mobile; there are no physical or trade barriers to selling into other dealer's areas; and dealers like Reeder sold trucks throughout the region. *Id.* at 8; 3 von

[10] Although Volvo did not seek certiorari on the question of whether Reeder's purchases involved "'commodities of like grade and quality,'" and the issue is not before the Court, the Government suggests that built-to-order products are unique and can never meet that standard. U.S. Br. 13 n.7. The determination of "like grade and quality" is based on the features of the final product sold and has nothing to do with whether it is factory-built after purchase. Reeder meticulously limited its proof to indistinguishable deals; often the dealer list price of the trucks compared were the same almost to the dollar. *See, e.g.*, JA 24, 92-93, 131, 143.

Kalinowski, *supra* § 39.02[2]. Other than its transactional theory of competition foreclosure, Petr. Br. 19-20, Volvo does not contest the sufficiency of this evidence on competition within the market, nor does it challenge the sufficiency of the findings that the jury was required to make under *Morton Salt*. Volvo does not contend that the different price concessions on Reeder's purchases of 102 trucks from 1996 to 1998 did not occur "over time" or that the differences in price were not "substantial." See, *e.g.*, *Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1034, 1039, 1041 (9th Cir. 1987) (holding that price differences over many years of 2.5 cents to 5.75 cents were substantial), *aff'd*, 496 U.S. 543 (1990); 3 von Kalinowski, *supra* § 39.02[3]. Indeed, price discrimination on 55% of Reeder's purchases amounting to $281,965 – which dwarfed Reeder's total annual gross profits on Class 8 sales in any year during that period – is substantial by any measure. JA 473; *supra* at 13. There was testimony that competition was keen and dealer profit margins were thin and compressing, JA 346, 407-08, 418, which strengthens the inference of a reasonable possibility of competitive injury. 14 Hovenkamp, *supra* ¶ 2333c, at 105. Under *Morton Salt*, the jury was entitled to find in favor of Reeder.[11]

E. Arguments That The Jury Was Not Entitled To Draw The *Morton Salt* Inference Are Both Waived And Without Merit.

As an alternative to the no-competition argument, Volvo and the Government claim that the jury was not entitled to draw the *Morton Salt* inference absent a finding of market

[11] Volvo does contend that the *Morton Salt* inference can be "overcome by evidence breaking the causal connection between a price differential and lost sales or profits," *Falls City*, 460 U.S. at 435. But Volvo does not cite *any* evidence that could have wholly extinguished (*id.* at 437) the causal connection between the discrimination and Reeder's lost profits (much less any that compels judgment as a matter of law in its favor). Indeed, Volvo presented none. Volvo's only rejoinder is to once again offer the fallacious claim that the discrimination on Reeder's purchases did not involve intrabrand competition. Petr. Br. 20.

power. Even though it acknowledges that it did not raise this question in its petition for certiorari, Volvo claims that this Court should construe the second clause of section 2(a) to require injury to *intrabrand competition* as a whole (and not injury to the victim's individual competition with rivals), as a complement to the first clause of section 2(a), which requires findings of substantial lessening of *interbrand competition* as a whole. Petr. Br. 38-39. According to Volvo, the second clause of section 2(a) should be construed to prevent discrimination only when discrimination favors "'the very powerful buyer or dealer who is able to force a supplier to behave contrary to its independent best interest.'" *Id.* at 37. In the same vein, the Government contends that the *Morton Salt* inference is not available "unless either the seller has significant market power or the favored purchaser is significant enough to sellers to demand concessions unavailable to others." U.S. Br. 25-26.

First and foremost, this argument is waived. Not only did Volvo not raise it in the petition for certiorari, it did not object to the *Morton Salt* instruction at trial, and never objected to the jury instruction on the ground that the jury may infer competitive injury from substantial discrimination only if the favored purchaser had market power against the seller. Tr. 749-55, 1015-19. Indeed, *Volvo actually proposed a Morton Salt instruction prior to trial.* Resp. App. 1-2. Failure to object to (and, *a fortiori*, proposal of) a jury instruction forecloses relief on any claimed error in the instruction. In *City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257 (1987) (per curiam), the petitioner argued that "a heightened negligence standard does not suffice" for municipal liability under § 1983, but "in the District Court petitioner did not object to the jury instruction stating that gross negligence would suffice, and indeed proposed its own instruction to the same effect." *Id.* at 259 (alteration and omission in original). This Court held that the petitioner had waived this argument and dismissed the writ of certiorari as improvidently granted. *Id.* at 259-60. The Court noted that the waiver in that case had

"special force" because "Rule 51 of the Federal Rules of Civil Procedure provides that '[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict.'" *Id.* at 259 (alteration and omission in original). Every word of this analysis applies with equal force to Volvo's failure to object to the *Morton Salt* instruction in this case.[12] This Court sits to review judgments, and the judgment cannot be reversed on this basis. If the *Morton Salt* issue is vital to this case, the Court should (as in *Kibbe*) dismiss the writ as improvidently granted.

Regardless, Volvo's arguments are unsound and would require overruling a slew of this Court's precedents. Volvo tries to wriggle around *Morton Salt* by characterizing as "dicta" this Court's quotation from the Senate Report that "a finding of injury to competition" under the second clause of section 2(a) could be made "by a showing of 'injury to the competitor victimized by the discrimination.'" *Morton Salt*, 334 U.S. at 49 (quoting S. Rep. No. 74-1502, at 4); Petr. Br. at 19-20. But Volvo fails to heed that the *test* that this Court announced based on that analysis – that substantial discrimination over time justifies an inference of competitive injury (without regard to buyer market power or effect on intrabrand competition) – was a holding of *Morton Salt* that has been repeatedly applied by this Court. *See Falls City*, 460 U.S. at 435 ("In *Morton Salt* this Court *held* that . . . [the] injury to competition is established . . . by proof of a substantial price discrimination between competing purchasers over time." (emphasis added)); *Texaco*, 496 U.S. at 559 ("'In *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 46-47 . . . (1948), we held that an injury to competition may be inferred from evidence that

[12] Because Volvo never raised this argument in its petition for certiorari, Reeder could not inform this Court of the waiver in its brief in opposition. As this Court held in *Kibbe*, "[i]t would be unreasonable to require a respondent on pain of waiver to object at the certiorari stage not only to the petitioner's failure to preserve the questions actually presented, but also to his failure to preserve any questions fairly included within the questions presented but uncontested earlier." 480 U.S. at 260.

some purchasers had to pay their supplier "substantially more for their goods than their competitors had to pay.'"").

Not only does the *Morton Salt* test adopted by this Court permit a violation of section 2(a) to be found by substantial discrimination against the disfavored purchaser over time, without more, but this Court has expressly rejected the claim that the recipient of the discrimination must have buyer power. In *Falls City*, the petitioner argued that "the *Morton Salt* rule should be applied only in cases involving 'large buyer preference or seller predation.'" 460 U.S. at 436. This Court disagreed, noting that "[a]lthough concerns about the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act," the text of the Act "'is of general applicability and prohibits discriminations generally.'" *Id.* This Court noted that "[t]he determination whether to alter the scope of the Act must be made by Congress, not this Court." *Id.*

Moreover, Volvo's argument would require overruling *Sun Oil*, which expressly interprets the RPA as ensuring "to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." 371 U.S. at 520. This Court's prior "equality of opportunity" interpretation of the RPA is irreconcilable with Volvo's buyer power thesis. Significantly, in *Sun Oil*, the violation of section 2(a) was a supplier's discrimination in favor of a small retail gas station. This Court refused to relieve Sun Oil from having to prove the affirmative defense of "meeting competition" under section 2(b), even though arguably the discrimination promoted interbrand competition:

> The Act is of general applicability and prohibits discriminations generally, subject only to defenses not based upon size. Competitive ability or business size may properly be a measure of antitrust application in other contexts, but there is no basis for reading such a standard into § 2(b) of this statute.

Id. at 522.

There is no basis for overruling these precedents, especially when Congress has never seen fit to do so despite numerous appeals to undo *Morton Salt* (including from the Executive Branch).[13] "Considerations of *stare decisis* have special force in the area of statutory interpretation," for Congress is always "free to alter" this Court's rulings. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

Even aside from *stare decisis*, this Court's decisions should not be overruled because they are rightly decided. Volvo trumpets the proposition that the RPA should be interpreted to be consistent with other antitrust laws, Petr. Br. 36, but this Court must still give meaning to the unique language in the RPA that is not present in the Sherman and Clayton Acts: namely that the RPA forbids not only price discrimination the effect of which "may be substantially to lessen competition . . . *in* any line of commerce," but also that which may "injure, destroy, or prevent competition *with*" specific persons. 15 U.S.C. § 13(a) (emphases added).

The word "competition" has the same meaning in both the first and second clauses of section 2(a) – it means vying for customers in the same market. *Tampa Elec.*, 365 U.S. at 327; see *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) ("'"identical words used in different parts of the same act are intended to have the same meaning"'"). But the two clauses protect competition in two different respects. The first protects competition in the market as a whole – "in any line of commerce" – and whether such competition has been "lessened" may indeed be measured by equilibrium output. 1 P. Areeda & H.

[13] *See, e.g.*, White House Task Force Report on Antitrust Policy (Neal Report) (1968) (calling for repeal); DOJ Report (same); S. 1008, 81st Cong. (1950) (legislation to narrow Act that went unenacted); S. 719, 82nd Cong. (1952) (same); S. 11, 84th Cong. (1955) (same); S. 1211, 85th Cong. (1st Sess. 1957) (same). The Government has effectively abandoned enforcement of the RPA because of ideological opposition, 1 T. Banks, *Distribution Law* § 3.01, at 3-3 to 3-4 (2d ed. 2005), and its arguments in favor of restricting the RPA should be considered in that light.

Hovenkamp, *Antitrust Law* ¶ 100a, at 3 (2d ed. 2000). On the other hand, only an individual competitor can be in "competition *with*" another competitor, and thus (as this Court has held) the clause is violated simply "by a showing of 'injury to the competitor victimized by the discrimination.'" *Morton Salt*, 334 U.S. at 49. This straightforward interpretation is consistent with the maxim that the antitrust laws protect "*competition*, not *competitors*." *Brown Shoe*, 370 U.S. at 320. Not every harm to the competitor from price discrimination violates the Act; but if that discrimination may have the "probable *future* effect," *id.* at 332, of harming the disfavored purchaser's "competition with" the favored purchaser, a violation has been proven. "The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition." *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945).[14]

Notwithstanding Volvo's claims, the plain language of section 2(a) simply does not say that only discriminations that

[14] Finding no refuge in this Court's secondary-line cases for its arguments, Volvo turns instead to a primary-line case. *Brooke Group* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). But *Brooke Group* only directly addressed the first clause of § 13(a), not the language at issue here. *See id.* at 229 ("[T]he Robinson-Patman Act . . . prohibits price discrimination 'where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly.'"). That language, as this Court itself noted in that case, "was part of the original Clayton Act § 2." *Id.* Moreover, primary line competitive injury (which is direct injury to interbrand competition) "is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act," *id.* at 221, and thus this Court undertook to reconcile the standards for liability under each, *id.* at 222-23. It is unsurprising that every court of appeals to consider Volvo's argument that *Brooke Group* should be applied to secondary-line cases has rejected it. *See George Haug Co.* v. *Rolls Royce Motors Cars Inc.*, 148 F.3d 136, 143 (2d Cir. 1998); *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 653, 658 (9th Cir. 1997); *Coastal Fuels of P.R., Inc.* v. *Caribbean Petroleum Corp.*, 79 F.3d 182, 191-93 (1st Cir. 1996); A. Gavil, *Secondary Line Price Discrimination And The Fate Of Morton Salt: To Save It, Let It Go*, 48 Emory L.J. 1057, 1083 (1999).

injure competition with favored purchasers *with buyer power* are actionable. Volvo attempts to tether its theory to the text of section 2(a) by arguing that secondary-line discrimination is only actionable if there is injury to competition with a purchaser who "knowingly receives the benefit of such discrimination," 15 U.S.C. § 13(a), which Volvo argues necessarily means a purchaser with market power against the seller. Petr. Br. 37. But a competitor can "knowingly" receive the benefit of discrimination without having buyer power against the seller. In any event, as a matter of plain language, Volvo is wrong that a secondary-line violation requires injury to competition with the "knowing[]" beneficiary of discrimination. Injury may be shown to competition with the grantor, the knowing recipient, or "with customers of either of them," 15 U.S.C. § 13(a): *i.e.*, customers of "the grantor or grantee." 80 Cong. Rec. at 9417 (remarks of Rep. Utterback). As the FTC has held,

> [T]he words "customers of either of them" include customers of the person granting the discriminatory price. Under that interpretation, there is thus no requirement that the customer receiving the favorable price be a "knowing" recipient in order for the respondent to be held accountable for its discriminatory actions in charging competing customers higher prices.

Purolator Prods., 65 F.T.C. 8, 41 (1964). Thus, secondary-line competitive injury may be established with regard to either a knowing beneficiary or any customer of the grantor, and tertiary-line competition with any customer of the knowing beneficiary. See *Falls City*, 460 U.S. at 436 (tertiary line competition).[15]

[15] Customers must still receive the benefit of discrimination for there to be competitive injury, but they need not have scienter. The purpose of the scienter requirement is not to limit secondary-line claims, but to limit tertiary-line claims; the RPA only allows a claim for injury at that removed stage if the original beneficiary was a knowing participant in the discrimination. Volvo's unnatural reading of section 2(a) would create the anomaly that secondary-line plaintiffs would have to prove scienter and/or market power of their rivals, but more distant tertiary-line plaintiffs would not. None of this Court's cases has required scienter to prove secondary-line claims. In all events, Volvo never sought a jury instruction that competitive injury can only be measured against "knowing" beneficiaries, so this issue is likewise not before this Court.

At the end of the day, Volvo is simply arguing that a narrow liability rule (an action for discrimination against favored purchasers with market power against the seller) better serves the goals of the antitrust laws than the broader one that Congress chose.[16] But it is Congress's prerogative to make a different judgment. Having witnessed the underdeterrence of price discrimination under the Clayton Act because of high evidentiary hurdles, and having established certain statutory defenses to protect pro-competitive price discriminations, Congress was free to establish a bright-line rule against all others that may injure the merchant's competition with favored purchasers, given that "'[o]nly through such injuries, in fact, can the larger general injury result.'" *Morton Salt*, 334 U.S. at 50 n.18 (quoting S. Rep. No. 74-1502, at 4). And Congress was free to fashion the rule to promote political objectives besides strict economic efficiency, such as creating "'equality of opportunity'" for independent businessman. *Sun Oil*, 371 U.S. at 520. There are many forms of economic legislation (workplace safety, environmental, and minimum wage laws are just a few such examples) where Congress

[16] Price discrimination can be inefficient in any given market, depending on the relative shapes of the market's demand, marginal cost, and marginal revenue curves. *See* W. Viscusi et. al, *Economics of Regulation and Antitrust* 286 (3d ed. 2000). This Court has cast doubt on arguments similar to the ones Volvo makes here regarding the efficiency of wholesale price discrimination to meet retail competition. *Sun Oil*, 371 U.S. at 522-23. There are strong reasons to believe that price discrimination of the kind Volvo practices has a negative effect on consumer welfare. *Supra* at 8-9; NADA Br. 25-26. Finally, nothing in the judgment below impairs Volvo's right to refuse to do business with dealers. However, when Volvo binds itself contractually to a self-renewing franchise agreement that it can only terminate for cause, it cannot use price discrimination to manufacture cause so as to drive the dealer out of business.

chooses to pursue such independent goals.[17] This Court has long properly deferred to the expressed intent of Congress:

> The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is 'not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation .... Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.'

Jefferson County Pharm. Ass'n v. *Abbott Labs.*, 460 U.S. 150, 170 (1983). This Court in the past has rejected "attempt[s] to amend the Robinson-Patman Act judicially." *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 78-79 (1979). This Court should not change course now, especially when the Antitrust Modernization Commission created by Congress is studying RPA issues, including modifying the *Morton Salt* inference and adding buyer power requirements. 70 Fed. Reg. 28902, 28904 (May 19, 2005).

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[17] The Government's arguments against permitting the jury to make the standard *Morton Salt* inference (likewise foreclosed by waiver) are even harder to fathom. First, the Government suggests that the *Morton Salt* inference is unavailable absent "concrete evidence of diversion of sales or profits to the favored dealers" and "a direct causal link" between the price discrimination and competitive injury. U.S. Br. 24-25. But the entire point of the *Morton Salt* presumption is to *relieve* a plaintiff of the burden of presenting direct evidence that it actually lost a sale to a competitor. *See, e.g., Falls City*, 460 U.S. at 435, 437-38; 1 ABA, *Antitrust Law Development* 450-51 (4th ed. 1997) (ABA Treatise). Second, the Government oddly claims that the *Morton Salt* inference was not warranted because Reeder had "ample alternative suppliers" and did not show that Volvo "has significant market power." U.S. Br. 25. Seller power is no more an element of an RPA secondary-line claim than is buyer power. *See Falls City*, 460 U.S. at 436. Regardless, Reeder had no franchise agreement with any other Class 8 manufacturer, and no alternative suppliers from which to buy trucks.

II. THE JURY WAS ENTITLED TO FIND REEDER SUFFERED ANTITRUST INJURY FROM VOLVO'S PRICE DISCRIMINATION.

Volvo's second question presented – whether antitrust injury may be based solely on "an unaccepted offer," Petr. Br. (i) – is predicated on its winning the first question on its transactional competition theory, such that its extraordinary discrimination of $281,965 on Reeder's *purchases* of 102 trucks must be excluded from the jury's determination of Reeder's "injur[y] in [its] business or property by reason of anything forbidden in the antitrust laws" under § 4 of the Clayton Act, 15 U.S.C. § 15(a). Petr. Br. 31. Both the premise and the substance of its arguments are unsound.

A. Loss Of Profits And Sales From Anticompetitive Price Discrimination Is Antitrust Injury.

Volvo argues in two short paragraphs of its brief that Reeder failed to make "some showing of actual injury attributable to something the antitrust laws were designed to prevent," *J. Truett Payne*, 451 U.S. at 562, such that the injury "flows from that which makes [the] defendants' acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Petr. Br. at 30-31. Volvo misconceives the concept of antitrust injury under *Brunswick*. In *Brunswick*, the plaintiff based his claim of injury on the fact that competitive bowling centers would have failed absent an unlawful merger; it did not allege that any anticompetitive conduct injured it. Rather, it sought antitrust damages simply from "continu[ing] competition" from the bowling centers. *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 109-10 (1986). Unlike the *Brunswick* plaintiff, however, Reeder did not seek recovery for "injury arising from the preservation or enhancement of competition," *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 483 n.19 (1982); rather, it proved actual injury from Volvo's unlawful anticompetitive acts of price discrimination. *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519,

529 n.19 (1983) (antitrust injury shown if plaintiff is "directly harmed by the defendants' unlawful conduct"). Reeder's evidence of actual profit loss from such discriminations constituted antitrust injury because it "flows from that which makes the defendants' acts unlawful," *Brunswick*, 429 U.S. at 489, and is "precisely "'the type of loss that the claimed violations . . . would be likely to cause.'"" *McCready*, 457 U.S. at 479 (quoting *Brunswick*, 429 U.S. at 489 (quoting *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969))). Although Reeder additionally presented ample proof to the jury that it was injured in its competition with favored purchasers, that is not a prerequisite of proving antitrust injury; the "plaintiff need not 'prove an actual lessening of competition in order to recover.'" *Id.* at 482 (quoting *Brunswick*, 429 U.S. at 489 n.14); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979) (section 4 satisfied solely by injury from unlawful "anticompetitive conduct").[18]

It is important to note at the outset that Volvo does not challenge the amount of damages awarded by the jury, but, rather only whether Reeder "establish[ed] standing" under § 4 by showing *any actual injury at all*. Petr. Br. 30-31. Moreover, Volvo stakes its entire argument on antitrust injury regarding the 102 truck sales on its no-competition theory. It does not present (and has thus waived) any alternative argument from the evidence that the jury could not infer *any* actual injury from the 102 discriminatory truck sales – and for good reason. The evidence was overwhelming.

This Court has traditionally recognized proof of lost profits and sales as a form of antitrust injury under § 4 in RPA cases, see, *e.g.*, *J. Truett Payne*, 451 U.S. at 565-67; 14 Hovenkamp, *supra* ¶ 2371c3, at 277, and Reeder presented evidence from which the jury could infer that Volvo's price discrimination caused it to lose a great deal of each.

[18] Nor does this case present section 4 issues of "duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed." *Cargill*, 479 U.S. at 111 n.6.

On the 102 trucks it purchased for resale at a discriminatory price, Reeder indisputably showed the fact of actual profit loss directly attributable to Volvo's anticompetitive discrimination in violation of the act.[19] Second, Reeder put on the classic proof that this Court has recognized as showing antitrust injury under the RPA: the loss of sales and profits "on the basis of plaintiff's estimate of sales it could have made absent the violation." *J. Truett Payne*, 451 U.S. at 565. Reeder showed that during the period of the discrimination, its sales and profits declined dramatically – both in absolute terms and as against a baseline of sales objectives that Volvo set and conceded was a "reasonably" achievable target. *E.g.*, JA 324. For example, Reeder's sales declined from 72 trucks in 1995 to only 8 trucks in 2000, causing Reeder to miss its objectives by between 23 and 67 trucks in the years during that period. JA 473-74. Its gross profits ($181,166 in 1995)

[19] In *J. Truett Payne*, this Court held that a plaintiff is not entitled to "'automatic damages' in the amount of the price discrimination" merely "upon a showing of the violation of § 2(a)," since actual injury is not an element of section (2)(a), and thus "proof of a violation does not mean that a disfavored purchaser has been actually 'injured' within the meaning of § 4." 451 U.S. at 561-63. In many instances, a retailer will not suffer actual profit loss from price discrimination: for example, where the retailer prices goods at a fixed margin above wholesale price, or where the price charged to the victim is the legally required price, *see, e.g., Davis* v. *Portland Seed Co.*, 264 U.S. 403, 418-21 (1924). Here, however, Reeder seeks a concession quote based on the anticipated price its customer will pay, and then after the discrimination, negotiates and resells the trucks at the final resale price with the customer. Because there is a negotiated price after the concession is granted, the jury in determining fact of injury could find that Reeder suffered some actual loss of profit by reason of the higher cost of goods attributable to Volvo's discrimination. As noted above, Reeder need only prove some injury to "business or property" attributable to unlawful anticompetitive conduct, 15 U.S.C. § 15(a), not "'an actual lessening of competition in order to recover.'" *McCready*, 457 U.S. at 482 (quoting *Brunswick*, 429 U.S at 489 n.14); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) ("burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy").

sank to $26,327 in 2000, and its average gross profit margin was worse than competing Volvo dealers. *Id.*

"In light of [the] traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury," this Court has held that a jury may infer from a decline in sales and profits during the period of the discrimination that the decline was caused by the discrimination:

> "[D]amages issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact-finder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure the plaintiffs' business, and from the evidence of the decline in prices, profits, and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.'"

J. Truett Payne, 451 U.S. at 565-66 (alteration in original).

Given Volvo's liability under § 2(a), there is no question that Volvo committed "wrongful acts" in this case. Moreover, the jury could infer that Volvo's discrimination had a "tendency to injure plaintiffs' business." The jury was entitled to find that the discrimination furthered the "Volvo Vision" of eliminating its smaller dealers from its dealer force, and anticompetitive tendency may be inferred from the anticompetitive purpose of the wrongdoer. *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). The jury had also heard ample evidence of the conditions for competitive success in selling Volvo trucks, *supra* at 6-7; it could infer that the sales and profit loss were at least in part attributable to the massive discrimination that diminished Reeder's reputation for competitiveness, its ability to compete for sales by sacrificing margin for certain desirable customers, and its ability to create and maintain customer relationships by investing in sales forces, advertising, marketing and service. *E.g.*, Tr.

791, 795, 828-32 ("On a class eight sale most of the time you've got to go to the customer," and Reeder lost salesmen during the period). The discrimination also enabled Volvo to issue a termination letter in 1999 (enmeshing Reeder in a legal battle to save its franchise) and thereby in 2000 strike Reeder from the dealer directory that Volvo publishes to customers. JA 253-54. In a boom market where Volvo is operating at full capacity, Reeder's sales declined to single digits from 1996 to 2000 at the same time when "favored dealer's sales and overall market sales stayed strong"; the jury could readily find that the sales Reeder would have made were diverted to favored Volvo dealers. Pet. App. 16a; CA8 JA 0577-79 (sealed volume) (detailing individual dealer sales, and showing strong sales by favored dealers).

Volvo argued to the jury that other causes contributed to the decline in Reeder's sales and profits, but the jury was not required to accept Volvo's alternative explanations. Indeed, that evidence – that Reeder lost its major customer and did not put sufficient effort into sales, JA 483 – was directly refuted by the extraordinary amount of potential deals Reeder quoted in the relevant time period (which at Volvo's average regional yield rates should have resulted in hundreds of sales). *Supra* at 12. Volvo does not argue – because it cannot – that its evidence of alternative explanations was so compelling that no reasonable jury could have rejected it. Indeed, even if other causes had played a role in Reeder's decline, Reeder could still establish actual injury so long as the jury could have reasonably concluded – as it was instructed (JA 483) – that Volvo's discrimination was simply *one* material cause of the decline. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969); ABA Treatise at 489. This Court does not sit to second-guess the jury on these points. "If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury." *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969).

B. The Jury Could Consider Discrimination That Prevented Reeder From Purchasing Trucks.

Volvo also argues that it was improper for the jury to consider evidence of discrimination which did not result in a sale in evaluating the fact of injury because allegedly Reeder was not a "purchaser" in relation to those transactions. Petr. Br. 29-31. As an initial matter, Volvo's transactional, on-and-off definition of the term "purchaser" was rejected long ago by this Court. In *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726 (1945), a petitioner sought to defend against an FTC judgment under section 2(e) of the Clayton Act, which bars discrimination "in favor of one purchaser against another purchaser" by "contributing to the furnishing of . . . services . . . upon terms not accorded to all purchasers," 15 U.S.C. § 13(e). It argued that the alleged discriminatory advertising allowances were not actionable because they were not part of a transaction in which "the Curtiss Candy Company [w]as a 'purchaser.'" *Corn Prods.*, 324 U.S. at 743. This Court disagreed, holding that the discrimination was actionable because "during the period in question the Curtiss Company was in fact a purchaser of petitioners' commodity." *Id.* The term "purchaser" has the same meaning in the Clayton Act and the RPA. *Jefferson County*, 460 U.S. at 155 n.11; *see also* 15 U.S.C. § 13(b) (defenses for "purchaser" common to both claims). It is quixotic for Volvo to claim that Reeder, whose exclusive business as a Class 8 vendor was to purchase and resell Volvo trucks, was not a purchaser during this period of continual purchases. See also 80 Cong. Rec. at 9418 (remarks of Rep. Utterback) (the Act does not permit a supplier, "once he has accepted the customer, to refuse discriminatorily to sell to him . . . [commodities] which the seller has set aside for exclusive sale at more favorable prices to selected customers in evasion of the purposes of this bill").

Volvo's "purchaser" arguments are in any event a red herring. The Eighth Circuit rejected the proposition that a mere offer to purchase was actionable. Pet. App. 9a. Reeder did

not have to rely on "mere offers" to establish actionable discrimination, and the jury did not find discrimination on that basis. *Id.* at 37a. Moreover, Reeder disclaimed that it was seeking damages for each of the discriminations. JA 283. But, as the Eighth Circuit held, that does not mean that these discriminations were excluded from consideration of antitrust injury in fact, which was also independently established as flowing from the 102 discriminatory truck sales. Pet. App. 17a. The evidence showed that even beyond the 102 truck sales Volvo engaged in systematic discrimination to cause Reeder to miss its sales objectives in order to terminate the franchise, and refuted Volvo's claim that the precipitous decline in Reeder's sales and profits from 1996 to 2000 were caused by its own alleged failings and bad luck rather than Volvo's violations of the Act.

Moreover, not only was the jury free to credit all such evidence in weighing the causes of antitrust injury and damages, but there were also a number of transactions that the jury was entitled to treat as purchases where Volvo's unlawful conduct prevented the purchase. This would not be true of every discriminatory price quote because the customer may have decided to purchase a different manufacturer's trucks regardless of the discrimination. However, price discrimination against a purchaser is actionable even in the absence of an actual purchase if the purchaser's "failure to [make the specific purchase] was directly attributable to defendant's own discriminatory practice." *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir. 1951); Rowe, *supra* § 4.1, at 48; *En Vogue* v. *UK Optical, Ltd.*, 843 F. Supp. 838 (E.D.N.Y. 1994) (discrimination in context of contractual relationship that requires purchases actionable). Any other rule would reward the wrongdoer for his wrong, and create the anomaly that anticompetitive price discrimination is actionable except when it is prohibitive.

In this case, constructive purchases were proved in those additional transactions where the retail customer had already

agreed to buy Volvo trucks at a given price. Thus, Reeder proved that it would have sold ten trucks at the $70,000 price it had negotiated with a customer (Danmarr) if Volvo had not discriminated on the concession. JA 19-26. In another deal, Reeder had placed an order purchasing six trucks for resale to Lane Freight. Two months later, Reeder asked Volvo for the same concession on four trucks Lane Freight wished to add to the order. Volvo instead *raised it wholesale price* by reducing the concession (despite granting better concessions to others), forcing Reeder to raise the retail price for the add-on trucks. This not only cost Reeder the sales and profits on this order, but damaged the relationship and caused Lane Freight not to purchase Volvo trucks from Reeder in the future. JA 139-41. Surely Reeder was a purchaser in this transaction; Volvo's discrimination affected only the *size* of the purchase. Finally, in the Hiland Dairy case, Reeder was competing directly with another Volvo dealer, the customer had agreed to purchase the Volvo trucks at a specific price, and Volvo diverted the sale to the favored dealer by granting a discriminatory concession. *Supra* at 14-15. There could be no starker example of price discrimination as a weapon to injure a dealer competitively. The RPA does not permit Volvo to deny its dealers "equal competitive footing so far as price is concerned." *Sun Oil*, 371 U.S. at 520.

Thus, Volvo's arguments on antitrust injury and causation, predicated on its unsound transactional competition theory, fall apart. The jury heard overwhelming evidence that Reeder lost sales and profits and suffered actual and competitive injury as Volvo aggressively pursued its plan to drive Reeder out of competition for Volvo truck sales.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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APPENDIX

DEFENDANT'S PROPOSED INSTRUCTION NO. _____

(Competitive Injury)

Plaintiff is also required to show that there is a reasonable possibility that the alleged price discrimination may harm competition. Plaintiff is not required to prove that the alleged price difference actually harmed competition.

To establish a reasonably possibility of harm to competition, plaintiff may prove a substantial difference in price between sales by defendant to plaintiff and sales by defendant to other competing purchasers over a significant period of time. This proof of a reasonable possibility of harm to competition can be overcome or rebutted if you find that defendant proved that any lost sales or profits were not caused by the price differential but were caused by some other factor or factors. Defendant claims that any loss of sales or profits by plaintiff resulted from things such as plaintiff's poor business practices, plaintiff's lack of effort to sell to customers other than large fleet customers, the disappearance of plaintiff's key customer, etc. If, however, you find that plaintiff actually lost some sales as a result of the alleged price discrimination, then harm to competition has been established to that extent. However, you are also instructed that it is not sufficient for plaintiff to show only loss of sales or other individual injury without also demonstrating a reasonable possibility of lessening of competition in the marketplace generally.

Also, you may consider whether Defendant's method of providing pricing to its dealers tends to promote, rather than inhibit, competition. Pricing methods such as discounts to new customers may well have the effect of increasing competition rather than decreasing it. Furthermore, defendant may defend against plaintiff's claim by showing that a lower price

to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.

If after considering the foregoing matters, you find that there is a reasonable possibility that defendant's alleged discriminatory pricing may harm competition, then you must find that plaintiff has established this element of its Robinson-Patman Act claim. If you find that there is not a reasonable possibility that the alleged discrimination may have such an effect or that defendant's method of pricing does not lessen competition or actually promotes competition, then you must find that defendant did not violate Section 2(a) and you must therefore find for defendant and against plaintiff on this claim.

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No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The U.S. Department of Justice and the Federal Trade Commission join Volvo in urging reversal of the judgment below because "there simply was no evidence that Volvo engaged in price discrimination in any transaction in which Reeder actually competed with another Volvo dealer for a sale." U.S. Br. 17.

Reeder does not seriously dispute that fact. Instead, it contends that liability properly can be imposed even when there is *no* transaction in which each of the essential elements of a Robinson-Patman Act (RPA) violation is present. Volvo's and the antitrust enforcement agencies' position is derided as a "novel transactional theory of 'competition.'" Resp. Br. 1.

Volvo's view is not "novel" and it is not a "theory." It is settled law, grounded in the plain language of the statute and in sound antitrust policy. Reeder's suggestion that treble damages can be assessed through a mix-and-match approach – showing one element of a statutory violation in one transaction, and a different element in an entirely unrelated transaction – would vastly expand the scope of the RPA. That expansion "would sacrifice vibrant interbrand competition * * * for an illusory gain in intrabrand competition." U.S. Br. 10; see also NEMA Br. 25; TMA Br. 10-12.

I. "Discrimination" In The Sales-To-Sales Comparisons Did Not Violate The RPA

Discrimination in price, standing alone, does not violate the RPA. The statutory language states plainly that discrimination is unlawful only if a plaintiff proves, among other things, (1) competitive injury – either a substantial lessening of competition "in any line of commerce" or an injury to "competition with any person who either grants or knowingly receives the benefit of such discrimination" – and (2) that the competitive injury was "the effect of such discrimination." 15 U.S.C. § 13(a).

Reeder emphasizes the price differences reflected in the "sales-to-sales" comparisons, *i.e.*, comparisons between (1) the price Volvo offered to Reeder in connection with Reeder's successful bid to sell to one retail customer – Customer A – and (2) the price Volvo offered to another dealer in connection with that dealer's bid to sell to a *different* retail customer – Customer B. Such comparisons account for the $280,000 "discrimination" claimed by Reeder. Resp. Br. 1. In these comparisons, there was no evidence that Reeder bid to sell trucks to Customer B, or that another Volvo dealer bid to sell trucks to Customer A. In fact, Reeder never even took the preliminary step of requesting a price quote from Volvo for Customer B, nor did any other Volvo dealer request a price quote from Volvo for Customer A. Reeder acknowledges that "there was no evidence" of bidding competition between Volvo dealers for these sales, but stakes its claim on the proposition that "it was simply not an element of Reeder's proof under section 2(a) to show whether another Volvo dealer was bidding for the same order." Resp. Br. 29 n.8. That contention is plainly wrong.

1. In the transactions that comprise the sales-to-sales comparisons, the price "discrimination" by Volvo could not possibly have cost Reeder a sale to Customer B. Reeder never made an offer to sell to Customer B, and did not even request a quote from Volvo in anticipation of a possible offer. It is unclear, but irrelevant, whether that was because Reeder made no effort to sell to Customer B, or because Customer B had no interest in buying from Reeder for reasons unrelated to price. What is crystal clear – and fatal to Reeder's RPA claim – is that Reeder's failure to make a sale to Customer B could not have been "the effect of" price discrimination. Neither Customer B nor Reeder could have known (and therefore neither could have based its business decisions on) the price that Volvo might have

offered to Reeder for a sale to Customer B.[1] *Reeder didn't even bother to ask.*

Nor could the "discrimination" have dampened Reeder's profits on its sale to Customer A. To be sure, Reeder would have preferred a lower price from Volvo. What customer wouldn't? As the government explains, however, that is a concern about "price, not price discrimination." U.S. Br. 23; accord 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2333b, at 89 & n.1 (1999). There is simply no evidence, and not even an articulated theory, that Reeder could have earned greater profits on its sale to Customer A if Volvo had raised its price to the other Volvo dealer selling to Customer B so as to eliminate this "discrimination." To the extent that "competition" constrained Reeder's profits on its sale to Customer A, that competition did not come from the other Volvo dealer. Customer A had no way of knowing what price the other dealer might have offered to it and Reeder could not have known either, because no such offer was extended. Nor could Customer A, Reeder, or the other Volvo dealer have known what price Volvo would have offered to the other dealer for a sale to Customer A, because the other dealer never requested a quote from Volvo for a sale to Customer A.

2. Recognizing that there was no evidence that another Volvo dealer actually bid against Reeder in any of the sales-to-sales comparisons, Reeder grasps at straws. "[E]ven if no other Volvo dealer has sought a concession quote at the same time [as Reeder], that does not mean that competition among Volvo

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[1] We give Reeder every benefit of the doubt – and then some – when we suggest that Reeder could not have known what price Volvo would offer to another Volvo dealer in this circumstance. In fact, the record is clear that Volvo's policy was to offer the same price to all dealers who were bidding for the same retail transaction. Reeder's evidence shows, at most, imperfect execution of that policy on rare occasions, and even that reading of the evidence is dubious. See pp. 11-13, *infra*.

dealers has been extinguished as to that transaction. The customer may at any time before purchase decide to turn to a second Volvo dealer." Resp. Br. 29 n.8. To sustain the judgment below, however, Reeder must point to evidence of what did happen, not mere speculation about what could have happened but did not. We do not quarrel with the proposition that another Volvo dealer was free to compete against Reeder for any sale or that retail customers were free to solicit bids from any Volvo dealer. The fact remains, though, that in the sales-to-sales comparisons there is no evidence that either of those things actually happened.

Moreover, Reeder's suggestion that liability can be based on such hypothetical competition requires speculation twice over. It is not enough for Reeder to observe that Customer A, hypothetically, could have solicited and received a bid from another Volvo dealer. Reeder must also *assume* that Volvo, if asked (as it was not), would have offered a different price to the other dealer than it offered to Reeder for that transaction. In other words, to sustain liability on this basis, Reeder must imagine both the discrimination and the competition with another Volvo dealer that the statute requires; nothing in the record suggests that either actually occurred.

3. The next line of defense is even more curious. Acknowledging "the *fact* that there was no evidence of price competition between Reeder and the other Volvo dealers in the bidding phase" (Resp. Br. 29 (emphasis added)), Reeder suggests a different theory: Because it paid higher prices than other Volvo dealers paid for trucks in unrelated transactions, Reeder's profits were limited, and that constraint on its profits injured its ability to engage in pre-bidding competition by offering various customer-attracting services. See Resp. Br. 27 (discussing advertising, marketing, enhanced service, promotion, and other customer-attracting services). That assertion is wrong under the law, as we explain in a moment. It is an

especially curious argument, though, because elsewhere in its brief Reeder emphasizes that during the period of the alleged discrimination

> [i]t invested in a new and more desirable dealership location * * * and hired additional salespeople. It aggressively sought sales from old and new accounts. Reeder steadily increased the number of customers that it brought to the point of a price quote, succeeding in quoting potential sales of 3,726 trucks from 1997 to 1999.

Resp. Br. 12. From these facts, it is evident that Reeder's ability to engage in pre-bidding competition was not impaired.[2] Thus, there was no evidence that the "discrimination" in the sales-to-sales comparisons interfered with Reeder's *opportunities* to bid for sales and, as shown previously, no evidence that the "discrimination" affected competition between Reeder and other Volvo dealers when they actually submitted bids for sales – because there was no competition between Reeder and any other Volvo dealer in the bidding for these sales.

In any event, Reeder's claim that its profits were impaired because it paid a higher price than other Volvo dealers paid in unrelated transactions is legally insufficient to support RPA liability, as well as being factually wrong. The reason is simple. Reeder's argument is merely a thinly disguised claim that it would have been better off with a lower price. In *every* instance of price discrimination, the purchaser who pays more will have

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[2] Reeder might argue that, even though its ability to engage in pre-bidding competition was not impaired in the short term, it will be impaired in the longer term. That argument, too, is insufficient to support the judgment. A likelihood of future competitive harm might support an action for an injunction; it will not support an award of damages under Section 4 of the Clayton Act. To recover damages, a plaintiff "must prove more than a violation of § 2(a), since such proof establishes only that injury *may* result." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 563 (1981) (emphasis in original).

fewer resources with which to compete for future sales. To hold that such an "injury" is sufficient to establish liability would remove all content from the statute's requirement that plaintiffs must prove not only discrimination, but also a competitive injury that is caused by the discrimination. Under Reeder's theory, price discrimination would always be illegal unless the defendant could prove that the discrimination was permitted by one of the RPA's affirmative defenses.

To illustrate the point, consider how Reeder's argument would apply in the following situation. Imagine that in the heavy truck market every Volvo dealer competes for every retail sale, and every retail sale involves commodities of like grade and quality. For each potential transaction between a dealer and a customer, Volvo offers exactly the same price to every dealer, but for sales to different retail customers Volvo offers (equally to every dealer) different prices. It would be absurd to suggest that such pricing by Volvo would violate the RPA. For each transaction, Volvo offers every dealer *exactly* the same price.

But if, in this hypothetical example, one dealer was more successful in selling to those retail customers for whom Volvo offered higher prices and another dealer was more successful in selling to retail customers for whom Volvo offered lower prices, the first dealer could make exactly the claim that Reeder makes here. The first dealer could show that it paid higher prices, on average, than the second dealer; that it could have earned greater profits if its average price had been lower; and that greater profits would allow it to invest more in "customer-attracting" services. It could make those showings even though the prices charged by Volvo had no effect at all on any dealer's ability to compete with any other dealer for any sale. The competition among dealers yields different outcomes for different dealers simply because each dealer adopts its own business strategy, because each dealer executes that strategy with greater or lesser skill, or because of random variation, not because of

price "discrimination" by Volvo. Under Reeder's theory, Volvo nevertheless would be liable for price discrimination in violation of the RPA unless it justified the discrimination by proving an affirmative defense. And Volvo could safely avoid that liability only by charging uniform prices in all transactions. As the antitrust agencies recognize, a rule of law that requires such price rigidity "would limit suppliers' ability to tailor prices to the competitive situation, and thus diminish the vigor of interbrand price competition." U.S. Br. 27.

It is no accident that Reeder's so-called competitive injury occurs in both the hypothetical example and the actual sales-to-sales comparisons. The effect does not arise in either case from discrimination between competing purchasers. It arises in both merely because every purchaser is "injured" by paying a higher price rather than a lower price, *regardless of the price other purchasers pay*, and because every purchaser can assert that a lower price would permit greater investment in its future competitive endeavors. Reeder does not suggest any limitation of its theory of competitive injury that would prevent such "injury" from arising in every case in which there is a price difference.

Reeder's theory, therefore, would radically expand the inference of competitive injury discussed in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948). It would convert a *permissible* inference that price differences may cause the requisite competitive harm into a rule that plaintiffs who show price differences, but nothing more, will *always* be able to recover damages. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), squarely rejected that proposition, and *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), reaffirmed the point. Plaintiffs must prove that price differences are the cause of their injury; the *Morton Salt* "inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Id.* at 435.

4. The jury's finding that Reeder and other Volvo dealers operated in the same relevant market does not require this Court to affirm the judgment.

Reeder is simply wrong when it argues (Resp. Br. 20-23) that, because it operates in the same relevant market as other Volvo dealers, price differences necessarily injure its "competition with" those dealers, even in the absence of competing bids for any potential sale.[3] The decisions of this Court that Reeder cites say nothing like that. Quite the contrary. In those decisions, the Court explicitly discussed evidence that the favored and disfavored purchasers *did* compete for the same customers, and that the price discrimination led directly to a diversion of sales from disfavored to favored purchasers. See *Falls City*, 460 U.S. at 437 (discussing "direct evidence of diverted sales"); *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 510 (1963) (testimony from disfavored purchasers that their customers turned to favored purchaser because of his lower price); *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 62 (1959) (discussing finding that purchasers "in the same shopping area, often side by side, were competitors * * * retailing the identical product to substantially the same segment of the public").

The statutory language provides no more support for Reeder than the case law. The closest the Clayton Act and the RPA, which amended the Clayton Act, come to using the words "relevant market" is various places in which they refer to a "line of commerce" or to a "section of the country." See, *e.g.*, 15 U.S.C. § 18 (prohibiting acquisitions that may substantially lessen competition "in any line of commerce * * * in any section of the country"). Those terms have been construed, respec-

[3] Reeder's expansive definition of "competition with" is necessary, but not sufficient, for affirmance. As we have explained, Reeder also must prove an *injury* to its competition with a favored purchaser that is *caused* by the discrimination, regardless of how "competition with" is defined.

tively, to require proof of a relevant product market and a relevant geographic market. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 324 (1962). Section 2(a) of the RPA uses the phrase "line of commerce" but only in reference to the first type of cognizable competitive injury, *i.e.*, a substantial lessening of competition "in any line of commerce." The statute does not refer to a "line of commerce" or to a "section of the country" when it describes the second type of competitive injury – the injury that Reeder claims – as harm to "competition with any person who either grants or knowingly receives the benefit of such discrimination."

"Competition with" a knowing beneficiary of discrimination is a more specific and narrower form of competition than competition throughout a "line of commerce." See pp. 19-20, *infra*. Reeder acknowledges this obvious point, then runs from it. While contending that *every* Volvo dealer in the relevant market is necessarily engaged in competition with Reeder, even if it has never competed for a single sale with many of those dealers (Resp. Br. 20-23), Reeder also asserts virtually the exact opposite: "[O]nly an individual competitor can be in 'competition *with*' another competitor." Resp. Br. 39 (emphasis in original). Those contradictory assertions cannot be reconciled.

Respondent's creative and selective quotation of Professor Hovenkamp (Resp. Br. 25) is also wide of the mark. A reading of the complete discussion of this point in Professor Hovenkamp's treatise makes clear that, in his view, the contours of the relevant market provide the "most obvious" criteria for determining whether favored and disfavored purchasers are competitors for purposes of the RPA, but not the *right* criteria. See 14 HOVENKAMP, *supra*, ¶ 2333b, at 89-90. "Most decisions focus on the basic question whether the favored and disfavored purchasers are trying to reach the same set of customers." *Id.* at 90. That is precisely the test that Reeder cannot satisfy here,

with respect to the other Volvo dealers involved in the sales-to-sales comparisons.

Professor Hovenkamp does not suggest that market definition is unrelated to the existence of "competition with" a favored purchaser in *every* RPA case, nor do we. But competition in the heavy truck market is very different from competition in other markets that may more legitimately be constrained by the RPA. In markets for standardized products that are sold from inventory at posted prices available to all purchasers, the relevant market may correspond closely to the "competition" required under the RPA. In that situation, a manufacturer cannot readily tie its price to a dealer to the identity of an individual *retail* customer the dealer might serve, so price discrimination may affect the disfavored dealer's ability to compete for *all* of its potential sales. Heavy trucks, though, are customized products, built to order *after* a sale, at retail prices and terms that are established on a transaction-by-transaction basis through customer interactions with the specific dealers competing for that sale. See Resp. Br. 4-5, 30-31. The sales-to-sales "discrimination" also occurred on a transaction-by-transaction basis, tailored to the specific circumstances of each potential retail sale. Because Volvo's wholesale price for a sale to one retail customer did not determine the wholesale price that would be available for a sale to a different retail customer, a "high" price in one transaction did not injure Reeder's "competition with" other Volvo dealers in unrelated transactions.

Reeder would simply brush aside these market realities in favor of an inflexible concept of "competition" that finds no support in the language of the statute, its competitive objectives, or prior judicial decisions.

II. "Discrimination" In The Head-To-Head Comparisons Did Not Violate The RPA

Liability cannot be based on the rare head-to-head comparisons in which Reeder and another Volvo dealer submitted bids for the same potential sale. Even if those comparisons reveal discrimination (a dubious premise on this record), they reveal, at most, discrimination between a purchaser and an offeree, not the discrimination "between different purchasers" that the RPA addresses.[4] In any case, Reeder seems to concede that this discrimination, standing alone, is insubstantial.

1. Reeder apparently has abandoned any contention that liability can be based on the transaction in which Reeder and another Volvo dealer submitted competing bids to sell trucks to Tommy Davidson; its brief makes no reference to this transaction at all. Volvo did not sell to either of its dealers in that transaction because the customer chose to purchase Freightliner trucks. Moreover, Volvo offered the same 18.9% concession to Reeder that it offered to the dealer against which Reeder was bidding. Reeder complained only that Volvo's price concession was untimely, not that there was discrimination "in price." JA 192-194.

Reeder now points to a new comparison, involving a potential sale to TSL. Resp. Br. 15. In this transaction, like the Tommy Davidson transaction, the customer ultimately decided that it would not buy Volvo trucks. There was no discrimination "between different purchasers" here (or in the Tommy Davidson transaction) because there was not even one "purchaser," much less two. And this transaction is not even a true head-to-head comparison involving two *bids* from different Volvo

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[4] The offer-to-sales comparisons (see Pet. Br. 6) suffer from the same deficiency, and also from the deficiencies that are present in the sales-to-sales comparisons discussed previously. For that reason, they require no separate discussion.

dealers; there is no evidence that the other Volvo dealer ever submitted a bid to TSL.[5]

The evidence reveals only one transaction – the Hiland Dairy transaction – in which Reeder lost a sale to another Volvo dealer.[6] In that transaction, Volvo initially offered the *same* price to Reeder and to Southwest Missouri Truck Center (SMTC), another Volvo dealer competing for the Hiland sale. JA 475-477. Volvo later granted an additional price concession to SMTC, to compensate partially for an increase in Volvo's list prices that occurred between SMTC's initial bid to Hiland in January and the day in August when, according to Mike Truta, "the dealer from Springfield called and said I got the order, the customer will take it under this provision. I'm sitting in his office." JA 364. The additional concession was granted only when Hiland chose to purchase from SMTC for reasons unrelated to Volvo's prices. Truta testified without contradiction that Hiland Dairy's decision to purchase from SMTC, rather than Reeder, was a "done deal" when he granted the additional concession on August 19, 1999. JA 353. Reeder's only basis (Resp. Br. 14-15) for questioning the testimony that the deal was already "done" when the additional concession was granted

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[5] The only evidence in the record on this point comes from the cross-examination of Bill Heck, Reeder's co-owner and manager. "[Y]ou don't know if the Charlotte dealer actually decided to submit a bid to, to TSL, do you? A. I think there's information in there that they elected not to, but I don't have any direct knowledge of that." 1/16/02 Tr. 467.

[6] Reeder strains to find ambiguity in Bill Heck's testimony (JA 305) that Reeder competed against another Volvo dealer for the same sale only two or three times. See Resp. Br. 25 n.5. But, regardless of how Mr. Heck's testimony is construed, the only examples of such competition that were identified at trial are those mentioned here. Reeder invites speculation that there were other examples of head-to-head competition beyond those shown at trial, but it does not even suggest, let alone point to *evidence* of, discrimination in the price that Volvo offered in these assumed, but unidentified, transactions.

on August 19 is the fact that the invoice confirming the order was *received* by Volvo on August 21, 1999. JA 91-92.

Although we submit that the jury had to accept Truta's uncontradicted testimony rather than make up a contrary version of the facts with no evidence, in the end it makes no difference. What Truta's testimony illustrates is *why* the two-purchase rule that has been settled law for decades (Pet. Br. 25-28) makes sense (see *id.* at 28-29). Even if one assumes Truta's testimony to have been false, all that follows is that the Hiland Dairy transaction is a less good illustration of why the rule makes sense, not that the rule no longer exists or that Reeder has proven what the words of the statute require, "discriminat[ion] in price between different purchasers of commodities of like grade and quality." 15 U.S.C. § 13(a). If Mike Truta had picked up the phone on August 19, 1999, and asked a lawyer to advise him whether the RPA required him to offer Reeder the same price he had just offered to SMTC, a competent counselor would have consulted the treatises cited at Pet. Br. 26-27 and confidently answered "no" – notwithstanding the outlier decisions cited on page 49 of Reeder's brief, which *assume* that it is "wrong" to behave in this manner and then say the defendant should not be "rewarded" for engaging in conduct that the court apparently does not like, but that Congress has not outlawed.[7]

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[7] The Rowe treatise, which Reeder includes in its string citation on page 49, supports Volvo, not Reeder. It notes that the "doctrine" of the *Shaw's* case, cited in our opening brief at 26, "has been invariably reiterated in the decisions which reject Robinson-Patman allegations * * * seeking to construct a discrimination from mere price quotations rather than at least two completed sales." It then notes that "one court held" to the contrary, citing the same 1951 Fifth Circuit decision that appears on page 49 of Reeder's brief. FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT § 4.1, at 47-48 & n.11 (1962). The Fifth Circuit itself is no longer an outlier. See *M.C. Mfg Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059, 1066-1067 & n.17 (5th Cir. 1975) (following two-purchase rule in situation indistinguishable from this case), cert. denied, 424 U.S. 968 (1976); see also

2. The RPA prohibits only discrimination "between different purchasers." If there was any "discrimination" at all in the head-to-head comparisons, it was discrimination between a purchaser and an offeree (in the Hiland Dairy transaction) or between two offerees (in the Tommy Davidson and TSL transactions). It is settled law that the RPA does not apply to such discrimination. See Pet. Br. 25-29.

Reeder describes the two-purchase rule as an "exemption" for "sales * * * that are not from inventory" and criticizes the "arbitrary effect" of the rule because "application of the RPA does not depend upon the business model an industry adopts." Resp. Br. 30-31. Reeder is wrong on all counts. The two-purchase rule does not create an "exemption" from the RPA, but merely acknowledges that the RPA does not apply in the first instance unless two sales occur. And the rule does not prevent the application of the RPA to "sales." It recognizes that the RPA does not apply in the *absence* of two sales.

More fundamentally, the application of the RPA unquestionably *does* depend on the "business model" the defendant uses, because Congress banned price discrimination only in specifically defined types of transactions. "We are not interpreting a broadly phrased constitutional provision, but rather a narrowly worded statutory enactment with specific prohibitions and specific exceptions." *FTC* v. *Sun Oil*, 371 U.S. at 528; see also WLF Br. 5-6. The statute applies to sales of commodities, but not to sales of services. It applies to sales "in commerce" but not to sales "affecting commerce." It applies to discrimination "between different purchasers" but not to discrimination between lessees, licensees, consignees, or sales agents. Indeed, most treatises on the RPA begin with discussion of the "jurisdictional" elements of the RPA – including the two-

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API Br. 6 & n.3. It does appear that the Sixth Circuit may remain an outlier. See U.S. Br. 18 n.10.

purchase requirement – and a recitation of the countless cases that turn on whether the discriminatory transactions are of the kind (*i.e.*, reflect the "business model") that the statute addresses. See, e.g., ROWE, *supra*, ch. 4, at 45-86; 14 HOVENKAMP, *supra*, ¶¶ 2310-2316, at 12-53; EARL W. KINTNER, A ROBINSON-PATMAN PRIMER 35 (2d ed. 1979).

All of these "jurisdictional" distinctions are "arbitrary" in the sense that any exercise of legal line-drawing is arbitrary. See RICHARD A. POSNER, THE ROBINSON-PATMAN ACT 34-37 (1976). Practices barely on one side of the line may be similar in effect to those barely on the other side of the line. But if a line is to be drawn it must be drawn somewhere, and it was rational for Congress, in the RPA, to draw the line between sales and offers. As Professor Hovenkamp explains, the two-purchase rule "is simply another way of saying that there is no 'attempt' offense built into the Robinson-Patman Act. If one attempts to violate the statute by offering a prospective purchaser a higher or lower price, but no transaction occurs, the statute simply has not been violated." 14 HOVENKAMP, *supra*, ¶ 2312d, at 27.

3. Reeder does not limit its argument to a frontal assault on the two-purchase rule; it also seeks to evade the rule by misdirection. It suggests that it "did not have to rely on 'mere offers' to establish actionable discrimination, and the jury did not find discrimination on that basis. Moreover, Reeder disclaimed that it was seeking damages for each of the discriminations." Resp. Br. 48-49 (citations omitted). But it then asserts that mere offers may be relied on to establish "antitrust injury in fact" and that the jury may rely on evidence of these offers "in weighing the causes of antitrust injury and damages." *Id.* at 49.

That is nonsense. If the jury did not find a violation from transactions in which there were "mere offers," then those transactions cannot establish "antitrust injury in fact" which must, of course, arise "from that which makes [the] defendant's acts un-

lawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). And if Reeder's "injury" in these transactions is not an "antitrust injury in fact" than it cannot recover damages for that injury. Antitrust plaintiffs who prove violations and antitrust injury in fact are not required to prove the *amount* of damage injury with precision, but that leniency does not excuse them from the requirement of showing a violation and an injury that flows from that violation. *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17, 19, 21-22 (1st Cir. 1981) (Breyer, J.). That is exactly the point of *J. Truett Payne*. See 451 U.S. at 562 ("To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."); *id.* at 569 ("Absent such a finding [of liability], we decline to apply to this case the lenient damage rules of our previous cases.").

4. Finally, the effect of the discrimination (if, in fact, there was discrimination) in the head-to-head comparisons is insubstantial. The loss of $30,000 gross profit in a single sale to Hiland Dairy (Resp. Br. 15; JA 100) cannot support RPA liability, even under a broad reading of *Morton Salt*, because the *Morton Salt* inference of competitive injury may be invoked only for substantial discrimination over time. See *Morton Salt*, 334 U.S. at 50; *Falls City*, 460 U.S. at 435; 3 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW § 22.6 (1983).

Reeder does not argue that "discrimination" in the Hiland Dairy transaction, standing alone, would constitute a violation of the RPA, much less that it would support the treble-damage award of $4,074,000. Pet. App. 33a. Instead, Reeder's claim of *substantial* discrimination rests on the sales-to-sales comparisons, in which Reeder purchased 102 trucks from Volvo. Resp. Br. 1, 43-47. Even if the head-to-head transactions would otherwise constitute cognizable discrimination, the judgment should be reversed because of their insubstantial effect.

III. The RPA Protects Competition, Not Individual Competitors

The preceding arguments provide ample grounds to reverse the judgment below, on the basis of settled law. However, this case also provides an opportunity for this Court to go further, if it chooses to do so, to resolve an important legal question that has divided the lower courts: Does the RPA protect the commercial interests of individual competitors when there is no injury to the process of "competition"?

1. The Court properly may decide this broader question if it chooses to do so. Reeder argues that Volvo waived its argument on this issue by failing to raise it in the petition for certiorari or to object to a contrary jury instruction at trial. Resp. Br. 35. But Volvo *did* raise the issue in its petition, noting that the circuit split on this question could be resolved through a grant of certiorari. Pet. 16 n.3. The issue was not explicitly raised in the Questions Presented, but is sufficiently intertwined with the questions that were identified that this Court may reach the issue, consistently with its precedents, if it chooses to do so. See, *e.g.*, *City of Sherrill* v. *Oneida Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005); Pet. Br. 32 n.9.

Reeder is also wrong in its apparent belief that unobjected-to jury instructions, even if erroneous, forever bind courts and parties to whatever view of the law is stated in the instructions in reviewing whether the plaintiff had a claim at all. That is not correct; unobjected-to jury instructions waive only a claim of instructional error, not an objection to sufficiency under the correct law. In the latter kind of challenge, the key is whether the sufficiency of the plaintiff's evidence was disputed in a motion for directed verdict or for judgment as a matter of law, as it was here. See JA 4, Pet. App. 35a. If so, the correct law should be applied on appeal, whatever the jury instructions may say. *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 513-514 (1988); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120

(1988) (plurality opinion); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2537, at 348-349 & n.14 (1995 & Cum. Supp. 2005); *id.* § 2558, at 460-461 & n.9.

City of Springfield v. *Kibbe*, 480 U.S. 257 (1987) – which the *Praprotnik* plurality carefully distinguished in a discussion later adopted as a holding of this Court in *Boyle* – does not suggest otherwise. In that case, the writ of certiorari was dismissed as improvidently granted. The Court made clear that there was "no jurisdictional bar" (*id.* at 259) to its consideration of the issue, merely a question whether it should "exercise * * * discretion" (*id.* at 260) to do so. The Court concluded that it would not be prudent to do so in that case, largely because of concerns about "reversing a judgment *because of instructions* that petitioner accepted." *Id.* at 259 (emphasis added). Here, Volvo does not seek reversal because of improper but unobjected-to jury instructions. Volvo seeks reversal because there was no evidence to support the judgment under the correct law. And Reeder, while placing primary emphasis on its invalid waiver argument, and secondary emphasis on its legal argument that the RPA protects against harm to individual competitors, does not identify any evidence in the record to support the judgment below if, as we believe the Court properly may decide, the RPA requires harm to competition instead of mere harm to an individual competitor.

2. "Not every harm to the competitor * * * violates the Act," according to Reeder, only discrimination that has the "probable future effect" of harming the disfavored purchaser's competition with the favored purchaser. Resp. Br. 39 (quoting *Brown Shoe*, 370 U.S. at 332). As we have seen, however, under Reeder's conception this "probable future effect" on competition arises from every difference in price, regardless of its real competitive effects. Thus, the limitation Reeder suggests is an illusion.

The facts of this case demonstrate the point. Reeder itself emphasizes that "competition was keen and dealer profit margins were thin and compressing." Resp. Br. 34. Dealers worked diligently to develop customer relationships and opportunities to pitch new truck sales. *Id.* at 6. The result of this competition was record sales for Volvo and for the Class 8 truck industry as a whole. *Id.* at 11. And there can be no doubt that Volvo's (and other manufacturers') practice of reducing prices in an effort to win especially valuable retail customers had the purpose and effect of intensifying competition (both intrabrand competition and interbrand competition) to supply trucks to those customers. By offering lower rather than higher prices for sales to these customers, Volvo encouraged its dealers – *all* of its dealers, since the low price for that retail customer was offered to every dealer who requested a price quote – to compete more aggressively for that retail sale, whether they were competing against other Volvo dealers or against dealers selling other brands of trucks. Volvo's low price enhanced its dealers' opportunities to make additional sales in competition with other brands of trucks, to earn greater profit margins on their sales, or both. By creating greater incentives for its dealers to serve these retail customers, Volvo enhanced competition among dealers. That conclusion cannot be disputed merely because, in this competition as in all others, some of the competitors were winners and some were losers.

Reeder points to an economic text to support the point that price discrimination "can be" inefficient in some cases. Resp. Br. 41 n.16. We agree. The relevant legal issue, though, is whether Congress enacted a blanket prohibition against price discrimination, regardless of its effect on "competition," or whether it condemned only discrimination that causes injury to "competition." The statutory text answers that question. Reeder cannot point to any record evidence that Volvo's discrimination here was inefficient or that it harmed intrabrand or

interbrand "competition." In the complete absence of such evidence, the judgment should be reversed.

To the limited extent that Reeder actually addresses the relevant legal issue, its argument rests largely on broad generalities drawn from the legislative history of the RPA and from *dicta* in this Court's prior decisions, giving short shrift to what the statute actually says. As we have shown, the RPA refers to "competition" in a "line of commerce" (the competition addressed in the original Clayton Act) and "competition" with the beneficiaries of discrimination (the competition addressed by the RPA, which amended the Clayton Act). The language suggests a straightforward distinction between competition in a "line of commerce" that encompasses both interbrand and intrabrand competition (the first kind of injury) and intrabrand competition between favored and disfavored purchasers (the second kind of injury). Neither injury, though, is described as harm to an individual "competitor." See Pet. Br. 35-40.

Harm to "intrabrand competition" is, of course, very different from harm to "a competitor engaged in intrabrand competition." The latter is a precursor of the former *in some cases*. But in other cases, harm to the individual competitor (though not antitrust injury, *Brunswick*, 429 U.S. at 489) flows from the *enhancement* of intrabrand competition, simply because vigorous competition by definition creates winners and losers. And in still other cases, as here, the "harm" to an individual competitor may be entirely unrelated to the defendant's "discrimination." If a plaintiff utterly fails to produce evidence of anything more than a diminution of its own commercial success, and if the evidence shows vibrant intrabrand and interbrand competition, the RPA has not been violated.

CONCLUSION

The judgment of the court of appeals should be reversed.

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No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 25.5 of the Rules of this Court, petitioner Volvo respectfully submits this supplemental brief to present a single late authority that was not available to be included in Volvo's brief or reply brief on the merits. Specifically, Volvo calls to the Court's attention the newly published second edition of volume 14 of the treatise *Antitrust Law* by Herbert Hovenkamp. The second edition bears a 2006 copyright date and was received by petitioner's counsel October 4, 2005, well after the completion of merits briefing in August 2005.

Volume 14 of *Antitrust Law* is highly relevant to this case and was cited in both petitioner's and respondent Reeder's opening briefs. Most important, Reeder's opening brief – which, according to its table of authorities, cites volume 14 of *Antitrust Law* "*passim*" (as does Volvo's opening brief as well) – claims at page 25 that "it is ironic that Volvo block-quotes a passage on competitive injury from the Hovenkamp treatise, * * * which (as noted above) supports Reeder on this point." Resp. Br. 25 (citing 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2333b (1999)). At page 23 and in footnote 4, the same brief cites the same authority and claims that "[t]he 'relevant market,' and the existence of competition within that market, do not shift or shrink with the vagaries of a specific customer's shopping choices. 'Competition' under the RPA and other antitrust laws is simply not defined on a transactional, or customer-specific, basis." Resp. Br. 23 & n.4 (citing 14 HERBERT HOVENKAMP, *supra*, ¶ 2333b, at 89-90).

Volvo explained at page 9 of its reply brief why Reeder's position constituted a serious misreading of the Hovenkamp treatise, Paragraph 2333b in particular, by citing it as if it stood for the proposition that geographic market definition was the right approach to ascertaining what constitutes "competition with any person who either grants or knowingly receives the benefit of" discrimination in price between different purchasers of commodities. 15 U.S.C. § 13(a). "[I]n his view, the contours of the relevant market provide the 'most obvious' criteria for

determining whether favored and disfavored purchasers are competitors for purposes of the RPA, but not the *right* criteria." Pet. Reply Br. 9 (citing 14 HOVENKAMP, *supra*, ¶ 2333b, at 89-90).

The second edition of the treatise confirms with crystalline clarity that Volvo's understanding of Professor Hovenkamp's treatise in this regard was right and Reeder's was wrong. The very portion of the treatise that both parties cited – Paragraph 2333b – contains lengthy criticism of the Eighth Circuit decision in Reeder's favor:

> In *Reeder-Simco* the plaintiff bid on truck sales to customers after receiving a wholesale price quote from the defendant manufacturer. It actually purchased the trucks only if the bid was accepted. As a result, the plaintiff always made the sale with respect to those trucks that it actually purchased and for those sales on which it was not bidding against another Volvo dealer. Nevertheless, the Eighth Circuit found liability based on these instances because the plaintiff paid a higher wholesale price than other dealers paid during that time period, although those dealers were engaged in transactions different from the one that the plaintiff won. However, as a result of these lower wholesale prices, the favored dealers earned more money on these other sales to other customers.
>
> *But basing liability on these facts ignores the statute's requirement that the effect of the discrimination must be to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination."* The plaintiff was simply claiming that it would have earned more on the sales that it actually made had it been able to purchase those trucks at a lower price. Such a reading views the statute as a guarantee of equal profit margins on sales actually made, rather than a protection against injuries from sales that are not made because they were lost to a dealer who paid less. The plaintiff did not lose sales to a dealer who "receive[d] the benefit" of

> discrimination. Rather, it simply lost money on the actually made sales because other dealers made different sales to different customers at higher margins. The Eighth Circuit's reading would require manufacturers to charge uniform prices to their dealers, because any dealer who paid more could show that it would have earned more had it obtained a lower price than another dealer paid.

14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2333b, at 109 (2d ed. 2006) (footnotes omitted and emphasis added).

Elsewhere in Paragraph 2333b, Professor Hovenkamp explains in the new edition that the Eighth Circuit's decision failed to take adequate account of the fact that the "favored" dealers were not in competition with Reeder for the relevant sales:

> The *Reeder-Simco* decision discussed above involved dealers who did not buy the Volvo trucks that they resold until after they had a deal with the customer. In those cases the plaintiff never purchased the trucks at all, so there was no qualifying upstream "sale," as the Robinson-Patman Act requires. However, the Eighth Circuit found liability based on four situations where the plaintiff actually won the bid, purchased the trucks, and resold them. The court reasoned that although the plaintiff won these deals, other dealers during the same time period made different sales to different purchasers and earned higher margins on their sales because they paid a lower price for trucks than the plaintiff paid. There was apparently no truck that the plaintiff actually purchased and for which it lost the opportunity to make a resale because of a lower price obtained by a rival dealer. The injury that the court recognized could have occurred even if the dealers were thousands of miles apart and never competed for the same customers at all. In sum, for those prospective deals where the dealer lost out to a competing dealer it was not a purchaser, for those deals where the dealer made a purchase it also made a successful resale. The fact that other dealers may have made more money on *their* sales to different customers is an injury in the sense that the

> plaintiff might have made more as well, *but it is not the injury to competition that the Robinson-Patman Act requires.*

Id. ¶ 2333b, at 104 (footnote omitted; final emphasis added).

Rule 25.5 requires that a supplemental brief be "restricted to * * * new matter," and therefore this supplemental brief discusses only the new edition of the Hovenkamp treatise. Volvo's opening and reply briefs, and the amicus briefs of the United States and others, however, show that it is not just the views of treatise writers but also the statutory text and consistent judicial interpretations that require reversal of the judgment of the court of appeals. The new edition of the treatise confirms that clear conclusion. Reeder has shown no violation of the Robinson-Patman Act in this case.

CONCLUSION

For the reasons stated above and in petitioner's opening and reply briefs and the amicus briefs supporting petitioner, the judgment of the court of appeals should be reversed.

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RULE 29.6 STATEMENT

The Court may refer to the Rule 29.6 statement in respondent Reeder-Simco GMC, Inc.'s ("Reeder") brief in opposition to the petition for certiorari.

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F. Rowe, *Price Discrimination Under The Robinson-Patman Act* (1962) 4

RESPONDENT'S SUPPLEMENTAL BRIEF

Asserting that academic comment on a case is a "late authorit[y]" entitling it to file a supplemental brief, Sup. Ct. R. 25.5, Volvo argues that the 2006 edition of Professor Hovenkamp's *Antitrust Law* treatise supports its position. We welcome the filing of the supplemental brief because it shows that opponents of the decision below base their arguments entirely on policy in derogation of the plain language of the Robinson-Patman Act ("RPA") and the precedents of this Court and the Federal Trade Commission. The RPA does not limit how a plaintiff may prove injury to competition with rivals. This Court has enforced the RPA from its enactment according to its plain language, not shifting conceptions of economic policy, which are the province of Congress. Not only are Professor Hovenkamp's proposed policy-based limitations legally irrelevant, but also they make no sense.

Professor Hovenkamp's error arises principally from his failure to account either for the full language of the statute (which he selectively quotes) or for the interpretations of that language by this Court, the lower courts, and the FTC. Professor Hovenkamp argues that a plaintiff proves an RPA violation only if "the effect of the discrimination *must be* to 'injure, destroy, or prevent competition with any person who either grants of [sic] knowingly receives the benefit of such discrimination.'" 14 H. Hovenkamp, *Antitrust Law* ¶ 2333c, at 109 (2d ed. 2006) (emphasis added) (quoting 15 U.S.C. § 13(a)). From that reading of the statute, he concludes that the only competition that the RPA protects from injury is the competition to resell the specific goods purchased at discriminatory prices. He reasons that Volvo's discrimination on Reeder's 102 truck purchases could not have injured Reeder because, having resold those trucks to the customer who asked for the bid, Reeder never "lost the opportunity to make a resale because of a lower price obtained by a rival dealer." *Id.* ¶ 2333b4, at 104. He further states (without cita-

tion) that a dealer cannot suffer competitive injury if its market rivals "earned higher margins" on the goods they purchased at a favorable, discriminatory price. *Id.*; see also *id.* ¶ 2333c, at 109.

Professor Hovenkamp ignores the relevant statutory language in multiple respects. The RPA outlaws price discrimination "*the effect of*" which "*may be* ... to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or *with customers of either of them.*" 15 U.S.C. § 13(a) (emphases added). This Court has interpreted the italicized language in the first clause to require a "prognosis of the probable *future* effect" of the proscribed activity on competition with rivals in the market. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 332 (1962); *Corn Prods. Ref. Co.* v. *FTC*, 324 U.S. 726, 742 (1945) (RPA violated if "there is a reasonable possibility that [price discriminations] 'may' have such an effect."). Nothing in the language of the statute limits the RPA's protection to one aspect of market competition between rivals: *i.e.*, the competition to resell the specific commodity to a customer who may be shopping among certain dealers. Indeed, the RPA broadly prohibits price discrimination as to "commodities . . . sold for use, consumption, or resale" so long as they are of "like grade and quality," 15 U.S.C. § 13(a), which forecloses any claim that potential competitive injury is limited to competition in a single transaction to resell the specific, identified commodity. Finally, by insisting that the RPA requires injury to competition with the "knowing" recipient of the benefit of the discrimination, 14 Hovenkamp, *supra*, ¶¶ 2333c, 2342e, Professor Hovenkamp disregards the statutory language (and the FTC's longstanding rule) that an RPA violation may be shown in regard to competition with any "customers" of the discriminating supplier (here Volvo). 15 U.S.C. § 13(a); Resp. Br. 40.

Professor Hovenkamp is an unsparing critic of the RPA as enshrining bad policy, and a zealous advocate of legislative

amendment to limit the scope of actionable RPA injury.[1] The Congress is where such policy-based arguments belong. The RPA, unlike some antitrust statutes, does not grant judges common-law power to resolve cases according to their conceptions of optimal policy. Cf. *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 731-33 (1988) (justifying "dynamic" judicial creation of rules of reason using "economic analysis" because of the Sherman Act's adoption of common-law term "restraint of trade"). No amorphous common-law term appears in the RPA. To the contrary, this Court has rebuffed requests to engage in RPA "'policy-making'" and instead consistently enforces the statutory language and the intent of the Congress. *Jefferson County Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 170 (1983). Congress in 1936 defined the policy of the Act by its plain terms, and this Court should enforce those terms.

The broad language of the RPA does not restrict plaintiff's proof of potential competitive injury to showing that it "lost the opportunity to make a resale because of a lower price obtained by a rival dealer," as the Professor insists. 14 Hovenkamp, *supra*, ¶ 2333b, at 104. Nor can he support his claim that a jury cannot infer potential competitive injury if the plaintiff's market rivals "earned higher margins" on like goods that they purchased at a favorable, discriminatory price. *Id.* The courts and the FTC, giving the RPA its proper scope, uniformly hold that earning lower profit margins than rivals on resold goods because of substantial discrimination meets the injury requirement. Resp. Br. 26-29. Indeed, in the prior edition of his treatise, Professor Hovenkamp rightly summarized the law as holding that "simply making a lower markup than one's rivals is the kind of injury contemplated by the statute." 14 H. Hovenkamp, *Antitrust Law* ¶ 2333c2, at 104

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[1] H. Hovenkamp, *Antitrust Modernization Commission: Written Testimony on the Robinson-Patman Act* (July 2, 2005), *available at* http://www.amc.gov/commission_hearings/pdf/Hovenkamp.pdf (advocating amendments on competitive injury that would be favorable to Volvo).

(1999), *quoted in* Resp. Br. 26. Attempting to reconcile this law with his preferred policy outcome in this case, he has now changed that sentence to "simply making a lower markup than one's rivals *on sales to the same purchasers can be* the kind of injury contemplated by the statute," such that reduced profit margin only causes competitive injury if it resulted from resale price competition with a favored rival. 14 H. Hovenkamp, *Antitrust Law* ¶ 2333c2, at 116 (2d ed. 2006) (emphasis added). But neither the statute nor the precedents have changed in the interim, and the FTC and courts have long ruled that "profit impairment of resellers paying more for the product [is] competitive injury *even in the absence of resale price competition*." F. Rowe, *Price Discrimination Under The Robinson-Patman Act* § 8.4, at 183 (1962) (emphasis added; emphasis in original omitted); Resp. Br. 27-28 & n.7.

Not only is Professor Hovenkamp's proposed policy-based limitation contrary to the statutory language and precedent, but also it is logically incoherent. First, it virtually never happens that favored and disfavored dealers will simultaneously sell the very goods that they purchased at discriminatory prices to the same customer; Professor Hovenkamp's limitation of the profit-margin rule to that circumstance effectively abrogates it. Second, in his desire to limit the RPA to protecting only the competition to resell the specific commodity, he ignores how diminished profit margin affects competition. Profit margin is earned *upon* the resale of the commodity; reduced profit margin thus can never injure the competition *to resell* the specific good. Reduced profit margin from price discrimination always affects *future* competition with market rivals for *subsequent* sales to *different* customers, by limiting the ability of the victim to invest capital in customer acquisition and to price competitively in the market to win those sales. Resp. Br. 26-29. Reeder's claim is squarely

within the terms of the RPA, and the inference of potential competitive injury was an issue of fact for the jury.[2]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October 19, 2005

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[2] On the separate question of the test for determining whether actual competition exists among purchasers, Volvo mischaracterizes the Hovenkamp treatise. Volvo Supp. Br. 1-2. As he did in his prior treatise, *see* Resp. Br. 25, Professor Hovenkamp correctly maintains that "the Robinson-Patman inquiry typically differs from the general relevant market inquiry" only in that courts need not inquire whether "one seller's competition is sufficient to restrain the other's ability to set price above the competitive level." 14 H. Hovenkamp, *Antitrust Law* ¶ 2333b1, at 96-99 (2d ed. 2006). Indeed, on this point, Professor Hovenkamp recites without criticism the holding below that "the jury was entitled to find that [Reeder] and the favored dealers were in actual competition" under the RPA because they competed for customers in the same geographic market. *Id.* ¶ 2333b3, at 104.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

VOLVO TRUCKS NORTH AMERICA, INC. *v.* REEDER-SIMCO GMC, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04–905. Argued October 31, 2005—Decided January 10, 2006

Reeder-Simco GMC, Inc. (Reeder), an authorized dealer of heavy-duty trucks manufactured by Volvo Trucks North America, Inc. (Volvo), generally sold those trucks through an industry-wide competitive bidding process, whereby the retail customer describes its specific product requirements and invites bids from dealers it selects based on such factors as an existing relationship, geography, and reputation. Once a Volvo dealer receives the customer's specifications, it requests from Volvo a discount or "concession" off the wholesale price. Volvo decides on a case-by-case basis whether to offer a concession. The dealer then uses its Volvo discount in preparing its bid; it purchases trucks from Volvo only if and when the retail customer accepts its bid. Reeder was one of many regional Volvo dealers. Although nothing prohibits a Volvo dealer from bidding outside its territory, Reeder rarely bid against another Volvo dealer. In the atypical case in which a retail customer solicited a bid from more than one Volvo dealer, Volvo's stated policy was to provide the same price concession to each dealer. In 1997, after Volvo announced plans to enlarge the size of its dealers' markets and to reduce by almost half the number of its dealers, Reeder learned that Volvo had given another dealer a price concession greater than the discounts Reeder typically received.

Reeder, suspecting it was one of the dealers Volvo sought to eliminate, filed this suit under, *inter alia*, §2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. §13, alleging that its sales and profits declined because Volvo offered other dealers more favorable price concessions. At trial, Reeder presented evidence of two instances when it bid against another Volvo dealer for a particular sale. In the first, although Volvo initially offered Reeder a

lower concession. Volvo ultimately matched the concession offered to the competing dealer. Neither dealer won the bid. In the second, Volvo initially offered the two dealers the same concession, but increased the other dealer's discount after it, rather than Reeder, was selected. Reeder dominantly relied on comparisons between concessions it received on four occasions when it bid successfully against non-Volvo dealers (and thus purchased Volvo trucks), with more favorable concessions other successful Volvo dealers received in bidding processes in which Reeder did not participate. Reeder also compared concessions Volvo offered it on several occasions when it bid unsuccessfully against non-Volvo dealers (and therefore did not purchase Volvo trucks), with more favorable concessions accorded other Volvo dealers who gained contracts on which Reeder did not bid. Reeder did not look for instances in which it received a larger concession than another Volvo dealer, but acknowledged it was "quite possible" that such instances occurred. Nor did Reeder offer any statistical analysis revealing whether it was disfavored on average as compared to other dealers. The jury found a reasonable possibility that discriminatory pricing may have harmed competition between Reeder and other Volvo dealers, that Volvo's discriminatory pricing injured Reeder, and that Reeder's damages from Volvo's Robinson-Patman violation exceeded $1.3 million. The District Court awarded treble damages on the Robinson-Patman Act claim, and entered judgment.

Affirming, the Eighth Circuit, among other things, noted the threshold requirement that Reeder show it was a "purchaser" within the Act's meaning; rejected Volvo's contention that competitive bidding situations do not give rise to Robinson-Patman claims; held that the four instances in which Reeder purchased trucks following successful bids rendered it a purchaser under the Act; determined that a jury could reasonably decide Reeder was in actual competition with favored dealers at the time price differentials were imposed; and held that the jury could properly find Reeder had proved competitive injury based on evidence that (1) Volvo intended to reduce the number of its dealers, (2) Reeder lost one contract for which it competed with another Volvo dealer, (3) Reeder would have earned more profits, had it received the concessions given other dealers, and (4) Reeder's sales declined over time.

Held: A manufacturer may not be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer. The Act does not reach the case Reeder presents. It centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that

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character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process. Pp. 7–15.

1. Section 2 was enacted to curb financially powerful corporations' use of localized price-cutting tactics that gravely impaired other sellers' competitive position. *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 543, and n. 6. Augmenting §2, the Robinson-Patman Act targeted the perceived harm to competition occasioned by the advent of large chain stores able to obtain lower prices for goods than smaller buyers could demand. Robinson-Patman does not ban all price differences charged to different purchasers of similar commodities, but proscribes only "price discrimination [that] threatens to injure competition," *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 220. Of the three categories of competitive injury that may give rise to a Robinson-Patman claim, secondary-line cases, like this one, involve price discrimination that injures competition among the discriminating seller's customers (here, Volvo's dealerships). Reeder has satisfied the Act's first two requirements for establishing secondary-line injury: (1) The relevant Volvo truck sales were made in interstate commerce, and (2) the trucks were of "like grade and quality," 15 U. S. C. §13(a). Because Reeder has not identified any differentially-priced transaction in which it was both a "purchaser" under the Act and "in actual competition" with a favored purchaser for the same customer, see *e.g.*, *FTC* v. *Sun Oil Co.*, 371 U. S. 505, 518–519, Volvo and *amicus* United States maintain that Reeder cannot satisfy the Act's third and fourth requirements—that (3) Volvo "discriminate[d] in price between" Reeder and another purchaser of Volvo trucks, and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition" to the advantage of a favored purchaser, *i.e.*, one who "receive[d] the benefit of such discrimination," *ibid.* Absent actual competition with a favored Volvo dealer, Reeder cannot establish the competitive injury the Act requires. Pp. 7–10.

2. The injury to competition targeted by the Robinson-Patman Act is not established by the selective comparisons Reeder presented at trial: (1) comparisons of concessions Reeder received for four successful bids against *non-Volvo* dealers, with larger concessions other successful Volvo dealers received for *different sales* on which Reeder did not bid (purchase-to-purchase comparisons); (2) comparisons of concessions offered to Reeder in connection with several unsuccessful bids against *non-Volvo* dealers, with greater concessions accorded other Volvo dealers who competed successfully for *different sales* on which Reeder did not bid (offer-to-purchase comparisons); and (3) comparisons of two occasions on which Reeder bid against another

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Volvo dealer (head-to-head comparisons). Pp. 10–14.

(a) Because the purchase-to-purchase and offer-to-purchase comparisons fail to show that Volvo sold at a lower price to Reeder's "competitors," those comparisons do not support an inference of competitive injury. See *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U. S. 428, 435. Both types of comparisons fall short because in none of the discrete instances on which Reeder relied did it compete with beneficiaries of the alleged discrimination *for the same customer*. Nor did Reeder even attempt to show that the compared dealers were consistently favored over it. Reeder simply paired occasions on which it competed with *non-Volvo* dealers for a sale to Customer A with instances in which other Volvo dealers competed with *non-Volvo* dealers for a sale to Customer B. The compared incidents were tied to no systematic study and were separated in time by as many as seven months. This Court declines to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality. No similar risk of manipulation occurs in cases kin to the chain-store paradigm. Here, there is no discrete "favored" dealer comparable to a chain store or a large independent department store—at least, Reeder's evidence is insufficient to support an inference that such a dealer exists. For all that appears, Reeder, on occasion, might have gotten a better deal vis-à-vis one or more of the dealers in its comparisons. While Reeder may have competed with other Volvo dealers for the opportunity to bid on potential sales in a broad geographic area, competition at that initial stage is based on a variety of factors, including the existence *vel non* of a relationship between the potential bidder and the customer, geography, and reputation. Once the customer has chosen the particular dealers from which it will solicit bids, the relevant market becomes limited to the needs and demands of the particular end user, with only a handful of dealers competing for the sale. Volvo dealers' bidding for sales in the same geographic area does not import that they in fact competed for the same customer-tailored sales. Pp. 11–12.

(b) Nor is a Robinson-Patman violation established by Reeder's evidence of two instances in which it competed head to head with another Volvo dealer. When multiple dealers bid for the business of the *same* customer, only one dealer will win the business and thereafter purchase the supplier's product to fulfill its contractual commitment. Even assuming the Act applies to head-to-head transactions, Reeder did not establish that it was *disfavored* vis-à-vis other Volvo dealers in the rare instances in which they competed for the same sale—let alone that the alleged discrimination was substantial. Reeder's evidence showed loss of only one sale to another Volvo dealer, a sale of 12 trucks that would have generated $30,000 in gross profits for

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Reeder. Per its policy, Volvo initially offered Reeder and the other dealer the same concession, but ultimately granted a larger concession to the other dealer after it had won the bid. In the only other instance of head-to-head competition, Volvo increased Reeder's initial discount to match the discount offered the other competing Volvo dealer, but neither dealer won the bid. If price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between Reeder and the "favored" Volvo dealer. Pp. 12–13.

3. The Robinson-Patman Act signals no large departure from antitrust law's primary concern, interbrand competition. Even if the Act's text could be construed as Reeder urges and the Eighth Circuit held, this Court would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*. There is no evidence here that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. By declining to extend Robinson-Patman's governance to such cases, the Court continues to construe the Act consistently with antitrust law's broader policies. Pp. 13–14.

374 F. 3d 701, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which THOMAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–905

VOLVO TRUCKS NORTH AMERICA, INC., PETITIONER *v.* REEDER-SIMCO GMC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 10, 2006]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns specially ordered products—heavy-duty trucks supplied by Volvo Trucks North America, Inc. (Volvo), and sold by franchised dealers through a competitive bidding process. In this process, the retail customer states its specifications and invites bids, generally from dealers franchised by different manufacturers. Only when a Volvo dealer's bid proves successful does the dealer arrange to purchase the trucks, which Volvo then builds to meet the customer's specifications.

Reeder-Simco GMC, Inc. (Reeder), a Volvo dealer located in Fort Smith, Arkansas, commenced suit against Volvo alleging that Reeder's sales and profits declined because Volvo offered other dealers more favorable price concessions than those offered to Reeder. Reeder sought redress for its alleged losses under §2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Price Discrimination Act, 49 Stat. 1526, 15 U. S. C. §13 (Robinson-Patman Act or Act), and the Arkansas Franchise Practices Act, Ark. Code Ann. §4–72–201 *et seq.* (2001). Reeder prevailed at trial and on appeal on both claims.

We granted review on the federal claim to resolve the question whether a manufacturer offering its dealers different wholesale prices may be held liable for price discrimination proscribed by Robinson-Patman, absent a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer. While state law designed to protect franchisees may provide, and in this case has provided, a remedy for the dealer exposed to conduct of the kind Reeder alleged, the Robinson-Patman Act, we hold, does not reach the case Reeder presents. The Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process.

I

Volvo manufactures heavy-duty trucks. Reeder sells new and used trucks, including heavy-duty trucks. 374 F. 3d 701, 704 (CA8 2004). Reeder became an authorized dealer of Volvo trucks in 1995, pursuant to a five-year franchise agreement that provided for automatic one-year extensions if Reeder met sales objectives set by Volvo. *Ibid.* Reeder generally sold Volvo's trucks through a competitive bidding process. *Ibid.* In this process, the retail customer describes its specific product requirements and invites bids from several dealers it selects. The customer's "decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation, and cold calling or other marketing strategies initiated by individual dealers." *Id.*, at 719 (Hansen, J., concurring in part and dissenting in part).

Once a Volvo dealer receives the customer's specifica-

tions, it turns to Volvo and requests a discount or "concession" off the wholesale price (set at 80% of the published retail price). *Id.*, at 704. It is common practice in the industry for manufacturers to offer customer-specific discounts to their dealers. *Ibid.*; App. 334, 337. Volvo decides on a case-by-case basis whether to offer a discount and, if so, what the discount rate will be, taking account of such factors as industry-wide demand and whether the retail customer has, historically, purchased a different brand of trucks. App. 348–349, 333–334.[1] The dealer then uses the discount offered by Volvo in preparing its bid; it purchases trucks from Volvo only if and when the retail customer accepts its bid. *Ibid.*

Reeder was one of many Volvo dealers, each assigned by Volvo to a geographic territory. Reeder's territory encompassed ten counties in Arkansas and two in Oklahoma. 374 F. 3d, at 709. Although nothing prohibits a Volvo dealer from bidding outside its territory, *ibid.*, Reeder rarely bid against another Volvo dealer, see *id.*, at 705; 5 App. in No. 02–2462 (CA8), pp. 1621–1622 (hereinafter C. A. App.). In the atypical event that the same retail customer solicited a bid from more than one Volvo dealer, Volvo's stated policy was to provide the same price concession to each dealer competing head to head for the same sale. 4 C. A. App. 1161–1162; 5 *id.*, at 1619, 1621.

In 1997, Volvo announced a program it called "Volvo Vision," in which the company addressed problems it faced in the market for heavy trucks, among them, the company's assessment that it had too many dealers. Volvo projected enlarging the size of its dealers' markets and reducing the number of dealers from 146 to 75. 374 F. 3d,

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[1] To shield its ability to compete with other manufacturers, Volvo keeps confidential its precise method for calculating concessions offered to dealers. 374 F. 3d 701, 704–705 (CA8 2004); App. 337–338.

at 705. Coincidentally, Reeder learned that Volvo had given another dealer a price concession greater than the concessions Reeder typically received, and "Reeder came to suspect it was one of the dealers Volvo sought to eliminate." *Ibid.* Reeder filed suit against Volvo in February 2000, alleging losses attributable to Volvo's violation of the Arkansas Franchise Practices Act and the Robinson-Patman Act.

At trial, Reeder's vice-president, William E. Heck, acknowledged that Volvo's policy was to offer equal concessions to Volvo dealers bidding against one another for a particular contract, but he contended that the policy "was not executed." 4 C. A. App. 1162. Reeder presented evidence concerning two instances over the five-year course of its authorized dealership when Reeder bid against other Volvo dealers for a particular sale. 374 F. 3d, at 705, 708–709. One of the two instances involved Reeder's bid on a sale to Tommy Davidson Trucking. 4 C. A. App. 1267–1268. Volvo initially offered Reeder a concession of 17%, which Volvo, unprompted, increased to 18.1% and then, one week later, to 18.9%, to match the concession Volvo had offered to another of its dealers. 5 *id.*, at 1268–1272. Neither dealer won the bid. *Id.*, at 1272. The other instance involved Hiland Dairy, which solicited bids from both Reeder and Southwest Missouri Truck Center. *Id.*, at 1626–1627. Per its written policy, Volvo offered the two dealers the same concession, and Hiland selected Southwest Missouri, a dealer from which Hiland had previously purchased trucks. *Ibid.* After selecting Southwest Missouri, Hiland insisted on the price Southwest Missouri had bid prior to a general increase in Volvo's prices; Volvo obliged by increasing the size of the discount. *Id.*, at 1627. See also *id.*, at 1483–1488; 374 F. 3d, at 720 (Hansen, J., concurring in part and dissenting in part).

Reeder dominantly relied on comparisons between concessions Volvo offered when Reeder bid against non-

Volvo dealers, with concessions accorded to other Volvo dealers similarly bidding against non-Volvo dealers for other sales. Reeder's evidence compared concessions Reeder received on four occasions when it bid successfully against non-Volvo dealers (and thus purchased Volvo trucks), with more favorable concessions other successful Volvo dealers received in connection with bidding processes in which Reeder did not participate. *Id.*, at 705–706. Reeder also compared concessions offered by Volvo on several occasions when Reeder bid unsuccessfully against non-Volvo dealers (and therefore did not purchase Volvo trucks), with more favorable concessions received by other Volvo dealers who gained contracts on which Reeder did not bid. *Id.*, at 706–707.

Reeder's vice-president, Heck, testified that Reeder did not look for instances in which it received a *larger* concession than another Volvo dealer, although he acknowledged it was "quite possible" that such instances occurred. 5 C. A. App. 1462. Nor did Reeder endeavor to determine by any statistical analysis whether Reeder was disfavored on average as compared to another dealer or set of dealers. *Id.*, at 1462–1464.

The jury found that there was a reasonable possibility that discriminatory pricing may have harmed competition between Reeder and other Volvo truck dealers, and that Volvo's discriminatory pricing injured Reeder. App. 480–486. It further found that Reeder's damages from Volvo's Robinson-Patman Act violation exceeded $1.3 million. *Id.*, at 486.[2] The District Court summarily denied Volvo's motion for judgment as a matter of law and the company's alternative motion for new trial or remittitur, awarded

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[2]The jury also awarded Reeder damages of $513,750 on Reeder's state-law claim under the Arkansas Franchise Practices Act. No question is before us respecting that claim, which trained on Volvo's alleged design to eliminate Reeder as a Volvo dealer. See *supra*, at 4.

treble damages on the Robinson-Patman Act claim, and entered judgment.

A divided Court of Appeals for the Eighth Circuit affirmed. The appeals court noted that, "as a threshold matter[,] Reeder had to show [that] it was a 'purchaser' within the meaning of the [Act]," 374 F. 3d, at 708, *i.e.*, that "there were actual sales at two different prices[,] . . . a sale to [Reeder] and a sale to another Volvo dealer," *id.*, at 707–708. Rejecting Volvo's contention that competitive bidding situations do not give rise to claims under the Robinson-Patman Act, *id.*, at 708–709, the Court of Appeals observed that Reeder was "more than an unsuccessful bidder," *id.*, at 709. The four instances in which Reeder "actually purchased Volvo trucks following successful bids on contracts," the court concluded, sufficed to render Reeder a purchaser within the meaning of the Act. *Ibid.*

The Court of Appeals next determined that a jury could reasonably decide that Reeder was "in actual competition" with favored dealers. *Ibid.* "[A]s of the time the price differential was imposed," the court reasoned, "the favored and disfavored purchasers competed at the same functional level . . . and within the same geographic market." *Ibid.* (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F. 2d 578, 585 (CA2 1987)). The court further held that the jury could properly find from the evidence that Reeder had proved competitive injury from price discrimination. Specifically, the court pointed to evidence showing that (1) Volvo intended to reduce the number of its dealers; (2) Reeder lost the Hiland Dairy contract, for which it competed head to head with another Volvo dealer; (3) Reeder would have earned more profits, had it received the concessions other dealers received; and (4) Reeder's sales had declined over a period of time. 374 F. 3d, at 711–712. The court also affirmed the award of treble damages to Reeder. *Id.*, at 712–714.

Judge Hansen dissented as to the Robinson-Patman Act claim. "Traditional [Robinson-Patman Act] cases," he observed, "involve sellers and purchasers that carry inventory or deal in fungible goods." *Id.*, at 718. The majority, Judge Hansen commented, "attempt[ed] to fit a square peg into a round hole," *ibid.*, when it extended the Act's reach to the marketplace for heavy-duty trucks, where "special-order products are sold to individual, pre-identified customers only after competitive bidding," *ibid.* There may be competition among dealers for the opportunity to bid on potential sales, he noted, but "[o]nce bidding begins, . . . the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale." *Id.*, at 719. Violation of the Act, in Judge Hansen's view, could not be predicated on the instances Reeder identified in which it was a purchaser, for "there was no actual competition between" Reeder and another Volvo dealer at the time of Reeder's purchases. *Ibid.* "Without proof of actual competition" for the same customer when the requisite purchases were made, he concluded, "Reeder cannot demonstrate a reasonable possibility of competitive injury." *Ibid.*

We granted certiorari, 544 U. S. ___ (2005), to resolve this question: May a manufacturer be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer? Satisfied that the Court of Appeals erred in answering that question in the affirmative, we reverse the Eighth Circuit's judgment.

II

Section 2, "when originally enacted as part of the Clayton Act in 1914, was born of a desire by Congress to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the com-

petitive position of other sellers." *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 543, and n. 6 (1960) (citing H. R. Rep. No. 627, 63d Cong., 2d Sess., 8 (1914); S. Rep. No. 698, 63d Cong., 2d Sess., 2–4 (1914)). Augmenting that provision in 1936 with the Robinson-Patman Act, Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand. See 14 H. Hovenkamp, Antitrust Law ¶2302, p. 11 (2d ed. 2006) (hereinafter Hovenkamp); P. Areeda & L. Kaplow, Antitrust Analysis ¶602, pp. 908–909 (5th ed. 1997) (hereinafter Areeda). The Act provides, in relevant part:

> "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." 15 U. S. C. §13(a).

Pursuant to §4 of the Clayton Act, a private plaintiff may recover threefold for actual injury sustained as a result of a violation of the Robinson-Patman Act. See 15 U. S. C. §15(a); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S. 557, 562 (1981).

Mindful of the purposes of the Act and of the antitrust laws generally, we have explained that Robinson-Patman does not "ban all price differences charged to different purchasers of commodities of like grade and quality," *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*,

509 U. S. 209, 220 (1993) (internal quotation marks omitted); rather, the Act proscribes "price discrimination only to the extent that it threatens to injure competition," *ibid.* Our decisions describe three categories of competitive injury that may give rise to a Robinson-Patman Act claim: primary-line, secondary-line, and tertiary-line. Primary-line cases entail conduct—most conspicuously, predatory pricing—that injures competition at the level of the discriminating seller and its direct competitors. See, *e.g.*, *id.*, at 220–222; see also Hovenkamp ¶2301a, pp. 4–6. Secondary-line cases, of which this is one, involve price discrimination that injures competition among the discriminating seller's customers (here, Volvo's dealerships); cases in this category typically refer to "favored" and "disfavored" purchasers. See *ibid.*; *Texaco Inc.* v. *Hasbrouck*, 496 U. S. 543, 558, n. 15 (1990). Tertiary-line cases involve injury to competition at the level of the purchaser's customers. See Areeda ¶601e, p. 907.

To establish the secondary-line injury of which it complains, Reeder had to show that (1) the relevant Volvo truck sales were made in interstate commerce; (2) the trucks were of "like grade and quality"; (3) Volvo "discriminate[d] in price between" Reeder and another purchaser of Volvo trucks; and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition" to the advantage of a favored purchaser, *i.e.*, one who "receive[d] the benefit of such discrimination." 15 U. S. C. §13(a). It is undisputed that Reeder has satisfied the first and second requirements. Volvo and the United States, as *amicus curiae*, maintain that Reeder cannot satisfy the third and fourth requirements, because Reeder has not identified any differentially-priced transaction in which it was both a "purchaser" under the Act and "in actual competition" with a favored purchaser for the same customer.

A hallmark of the requisite competitive injury, our

decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. *FTC* v. *Sun Oil Co.*, 371 U. S. 505, 518–519 (1963) (evidence showed patronage shifted from disfavored dealers to favored dealers); *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U. S. 428, 437–438, and n. 8 (1983) (complaint "supported by direct evidence of diverted sales"). We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time. See *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 49–51 (1948); *Falls City Industries*, 460 U. S., at 435. Absent actual competition with a favored Volvo dealer, however, Reeder cannot establish the competitive injury required under the Act.

III

The evidence Reeder offered at trial falls into three categories: (1) comparisons of concessions Reeder received for four successful bids against *non-Volvo* dealers, with larger concessions other successful Volvo dealers received for *different sales* on which Reeder did not bid (purchase-to-purchase comparisons); (2) comparisons of concessions offered to Reeder in connection with several unsuccessful bids against *non-Volvo* dealers, with greater concessions accorded other Volvo dealers who competed successfully for *different sales* on which Reeder did not bid (offer-to-purchase comparisons); and (3) evidence of two occasions on which Reeder bid against another Volvo dealer (head-to-head comparisons). The Court of Appeals concluded that Reeder demonstrated competitive injury under the Act because Reeder competed with favored purchasers "at the same functional level . . . and within the same geographic market." 374 F. 3d, at 709 (quoting *Best Brands*, 842 F. 2d, at 585). As we see it, however, selective comparisons of the kind Reeder presented do not show the

injury to competition targeted by the Robinson-Patman Act.

A

Both the purchase-to-purchase and the offer-to-purchase comparisons fall short, for in none of the discrete instances on which Reeder relied did Reeder compete with beneficiaries of the alleged discrimination *for the same customer*. Nor did Reeder even attempt to show that the compared dealers were consistently favored vis-à-vis Reeder. Reeder simply paired occasions on which it competed with *non-Volvo* dealers for a sale to Customer A with instances in which other Volvo dealers competed with *non-Volvo* dealers for a sale to Customer B. The compared incidents were tied to no systematic study and were separated in time by as many as seven months. See 374 F. 3d, at 706, 710.

We decline to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality. See Tr. of Oral Arg. 34–35, 55. No similar risk of manipulation occurs in cases kin to the chain-store paradigm. Here, there is no discrete "favored" dealer comparable to a chain store or a large independent department store—at least, Reeder's evidence is insufficient to support an inference of such a dealer or set of dealers. For all we know, Reeder, on occasion, might have gotten a better deal vis-à-vis one or more of the dealers in its comparisons. See *supra*, at 5.

Reeder may have competed with other Volvo dealers for the opportunity to bid on potential sales in a broad geographic area. At that initial stage, however, competition is not affected by differential pricing; a dealer in the competitive bidding process here at issue approaches Volvo for a price concession only after it has been selected by a retail customer to submit a bid. Competition for an opportunity to bid, we earlier observed, is based on a variety of

factors, including the existence *vel non* of a relationship between the potential bidder and the customer, geography, and reputation. See *supra*, at 2.[3] We reiterate in this regard an observation made by Judge Hansen, dissenting from the Eighth Circuit's Robinson-Patman holding: Once a retail customer has chosen the particular dealers from which it will solicit bids, "the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale." 374 F. 3d, at 719. That Volvo dealers may bid for sales in the same geographic area does not import that they in fact competed for the same customer-tailored sales. In sum, the purchase-to-purchase and offer-to-purchase comparisons fail to show that Volvo sold at a lower price to Reeder's "competitors," hence those comparisons do not support an inference of competitive injury. See *Falls City Industries*, 460 U. S., at 435 (inference of competitive injury under *Morton Salt* arises from "proof of a substantial price discrimination between *competing purchasers* over time" (emphasis added)).

B

Reeder did offer evidence of two instances in which it competed head to head with another Volvo dealer. See *supra*, at 4. When multiple dealers bid for the business of the *same* customer, only one dealer will win the business and thereafter purchase the supplier's product to fulfill its contractual commitment. Because Robinson-Patman "prohibits only discrimination 'between different *purchas-*

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[3] A dealer's reputation for securing favorable concessions, we recognize, may influence the customer's bidding invitations. Cf. *post*, at 3, n. 2. We do not pursue that point here, however, because Reeder did not present—or even look for—evidence that Volvo consistently disfavored Reeder while it consistently favored certain other dealers. See *supra*, at 5.

ers,'" Brief for Petitioner 26 (quoting 15 U. S. C. §13(a); emphasis added), Volvo and the United States argue, the Act does not reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory. See Brief for Petitioner 27; Brief for United States as *Amicus Curiae* 9, 17–20. We need not decide that question today. Assuming the Act applies to the head-to-head transactions, Reeder did not establish that it was *disfavored* vis-à-vis other Volvo dealers in the rare instances in which they competed for the same sale—let alone that the alleged discrimination was substantial. See 1 ABA Section of Antitrust Law, Antitrust Law Developments 478–479 (5th ed. 2002) ("No inference of injury to competition is permitted when the discrimination is not substantial." (collecting cases)).

Reeder's evidence showed loss of only one sale to another Volvo dealer, a sale of 12 trucks that would have generated $30,000 in gross profits for Reeder. 374 F. 3d, at 705. Per its policy, Volvo initially offered Reeder and the other dealer the same concession. Volvo ultimately granted a larger concession to the other dealer, but only after it had won the bid. In the only other instance of head-to-head competition Reeder identified, Volvo increased Reeder's initial 17% discount to 18.9%, to match the discount offered to the other competing Volvo dealer; neither dealer won the bid. See *supra*, at 4. In short, if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between Reeder and the "favored" Volvo dealer.

IV

Interbrand competition, our opinions affirm, is the "primary concern of antitrust law." *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36, 51–52, n. 19 (1977). The Robinson-Patman Act signals no large departure from

that main concern. Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*.[4] In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. See *id.*, at 51–52 (observing that the market impact of a vertical practice, such as a change in a supplier's distribution system, may be a "simultaneous reduction of intrabrand competition and stimulation of interbrand competition"). By declining to extend Robinson-Patman's governance to such cases, we continue to construe the Act "consistently with broader policies of the antitrust laws." *Brooke Group*, 509 U. S., at 220 (quoting *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U. S. 69, 80, n. 13 (1979)); see *Automatic Canteen Co. of America* v. *FTC*, 346 U. S. 61, 63 (1953) (cautioning against Robinson-Patman constructions that "extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation").[5]

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[4]The dissent assails Volvo's decision to reduce the number of its dealers. *Post*, at 2, 5. But Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations. If Volvo did not honor its obligations to Reeder as its franchisee, "[a]ny remedy . . . lies in state laws addressing unfair competition and the rights of franchisees, not in the Robinson-Patman Act." Brief for United States as *Amicus Curiae* 28.

[5]See also 14 H. Hovenkamp, Antitrust Law ¶2333c, p. 109 (2d ed. 2006) (commenting that the Eighth Circuit's expansive interpretation "views the [Robinson-Patman Act] as a guarantee of equal profit margins on sales actually made," and thereby exposes manufacturers to treble damages unless they "charge uniform prices to their dealers").

* * *

For the reasons stated, the judgment of the Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–905

VOLVO TRUCKS NORTH AMERICA, INC., PETITIONER *v.* REEDER-SIMCO GMC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 10, 2006]

JUSTICE STEVENS, with whom JUSTICE THOMAS joins, dissenting.

Franchised dealers who sell Volvo trucks, like those who sell automobiles, farm equipment, washing machines, and a variety of other expensive items, routinely engage in negotiations with prospective purchasers. Sometimes the prospect is simultaneously negotiating with two Volvo dealers, sometimes with a Volvo dealer and a dealer representing another manufacturer, and still other times a satisfied customer who is generally familiar with the options available in a competitive market may negotiate with only one dealer at a time. Until today, the Robinson-Patman Act's prohibition of price discrimination[1] would have protected the dealer's ability to negotiate in all those situations. Today, however, by adopting a novel, transaction-specific concept of competition, the Court eliminates

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[1]Section 2 of the Clayton Act, as amended by §1 of the Robinson-Patman Act, provides in relevant part that

"It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. §13(a).

that statutory protection in all but those rare situations in which a prospective purchaser is negotiating with two Volvo dealers at the same time.

I

Setting aside for the moment the fact that the case involves goods specially ordered for particular customers rather than goods stocked in inventory, the case is a rather ordinary Robinson-Patman suit. Respondent Reeder alleged a violation of the Act; the parties submitted a good deal of conflicting evidence to the jury; the trial judge properly instructed the jurors on the elements of price discrimination, competitive injury, and damages; and the jury returned a verdict resolving all issues in Reeder's favor. The Court of Appeals found no error in either the instructions or the sufficiency of the evidence. 374 F. 3d 701 (CA8 2004).

Two issues of fact bear particular mention.

First, Volvo does not challenge the jury's finding of price discrimination. Reeder's theory of the case was that Volvo sought to cut back its number of dealers and deemed Reeder expendable. To avoid possible violations of franchise agreements and state laws, Volvo chose to accomplish this goal by offering Reeder worse prices than other regional dealers.

Reeder introduced substantial evidence of this theory. It showed that Volvo had an explicit business strategy, known as the "Volvo Vision," of "fewer dealers, larger markets." App. 34. It showed that Volvo could afford to lose sales as it squeezed dealers out, since the boom years of the late 1990's left Volvo with about as many orders as it could fill. *Id.*, at 256–257. And it showed that Volvo frequently gave worse prices to it than to other regional dealers. On at least four occasions, Volvo sold trucks to Reeder at significantly higher prices than to other dealers

buying similar trucks around the same time.[2] To give one example, in the spring of 1998 Volvo sold 20 trucks to Reeder at a 9% concession, but sold similar trucks to a Texas dealer at a 12.3% concession. *Id.*, at 132–134. This left Reeder paying $2,606 more per truck. *Id.*, at 134. Although the Court chides Reeder for failing to perform statistical analyses, see *ante*, at 5, 11, the jury clearly had a sufficient basis for finding price discrimination. It could infer that Volvo's pricing policies were comparable to a secret catalog listing one set of low prices for its "A" dealers and a higher set for its "B" dealers like Reeder, with an exception providing for the same prices where an "A" dealer and a "B" dealer were engaged in negotiations with the same customer at the same time.

Second, the jury found that the favored dealers at issue in these comparisons were competitive players in the same geographic market as Reeder. This conclusion is implicit in the jury's finding of competitive injury, since the jury instruction on that element required Reeder to prove

> "a substantial difference in price in sales by defendant to plaintiff and other competing Volvo dealers over a significant period of time. This requires plaintiff to show that it and the other Volvo dealer(s) were retail dealers within the same geographic market and that the effect of the price differential was to allow the other Volvo dealer(s) to draw sales or profits away from plaintiff." App. 480, Instruction No. 18.

Volvo does not dispute that the evidence was sufficient to support the jury finding that Reeder and the favored

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[2] Additionally, on more than 12 other occasions, Volvo offered worse deals to Reeder than it gave to dealers who made comparable purchases. Arguably due to Volvo's stingy concessions, Reeder failed to close with its customers in these instances and thus never ended up buying the trucks at issue from Volvo.

dealers operated in the same geographic market.[3] Volvo's restraint is wise, as Reeder offered evidence that truck buyers are unsurprisingly mobile, that it delivered trucks to purchasers throughout the region, and that customers would sometimes solicit bids from more than one regional Volvo dealer.

II

For decades, juries have routinely inferred the requisite injury to competition under the Robinson-Patman Act from the fact that a manufacturer sells goods to one retailer at a higher price than to its competitors. This rule dates back to the following discussion of competitive injury in Justice Black's opinion for the Court in *FTC* v. *Morton Salt Co.*, 334 U. S. 37 (1948):

> "It is argued that the findings fail to show that respondent's discriminatory discounts had in fact caused injury to competition. There are specific findings that such injuries had resulted from respondent's discounts, although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations 'may be substantially to lessen competition . . . or to injure, destroy, or prevent competition.' After a careful consideration of this provision of the Robinson-Patman Act, we have said that 'the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' *Corn Products Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, 742. Here the

[3]Similarly, and despite its selective discussion of the extensive evidentiary record, *ante*, at 2–5, the Court does not question the sufficiency of the evidence supporting the jury's finding that Volvo engaged in price discrimination against Reeder relative to other regional Volvo dealers for a significant period of time.

> Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate." *Id.*, at 45–47 (footnote omitted).

We have treated as competitors those who sell "in a single, interstate retail market." *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U. S. 428, 436 (1983); cf. *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 327 (1961). Under this approach—uncontroversial until today—Reeder would readily prevail. There is ample evidence that Volvo charged Reeder higher prices than it charged to competing dealers in the same market over a period of many months. That those higher prices impaired Reeder's ability to compete with those dealers is just as obvious as the injury to competition described by the Court in *Morton Salt*.

Volvo nonetheless argues that no competitive injury could have occurred because it never discriminated against Reeder when Reeder and another Volvo dealer were seeking concessions with regard to the same ultimate customer. In Volvo's view, each transaction was a separate market, one defined by the customer and those dealers whom it had asked for bids. For each specific customer who has solicited bids, Reeder's only "competitors" were the other dealers making bids. Accordingly, if none of these other dealers were Volvo dealers, then Reeder suffered no competitive harm (relative to other Volvo dealers) when Volvo gave it a discriminatorily high price.

Unlike the Court, I cannot accept Volvo's vision. Nothing in the statute or in our precedent suggests that "competition" is evaluated by a transaction-specific inquiry, and such an approach makes little sense. It requires us to ignore the fact that competition among truck dealers is a

continuing war waged over time rather than a series of wholly discrete events. Each time Reeder managed to resell trucks it had purchased at discriminatorily high prices, it was forced either to accept lower profit margins than were available to favored Volvo dealers or to pass on the higher costs to its customers (who then might well go to a different dealer the next time). And we have long indicated that lost profits relative to a competitor are a proper basis for permitting the *Morton Salt* inference. See, *e.g.*, *Falls City Industries*, 460 U. S., at 435 (noting that to overcome the *Morton Salt* inference, a defendant needs "evidence breaking the causal connection between a price differential and lost sales *or profits*" (emphasis added)). By ignoring these commonsense points, the Court gives short shrift to the Robinson-Patman Act's prophylactic intent. See 15 U. S. C. §13(a) (barring price discrimination where "the effect of such discrimination *may* be substantially to lessen competition" (emphasis added)); see also, *e.g.*, *Morton Salt*, 334 U. S., at 46.

The Court appears to hold that, absent head-to-head bidding with a favored dealer, a dealer in a competitive bidding market can suffer no competitive injury.[4] It is unclear whether that holding is limited to franchised dealers who do not maintain inventories, or excludes virtually all franchisees from the effective protection of the Act. In either event, it is not faithful to the statutory text.

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[4]Indeed, if Volvo's argument about the meaning of "purchaser," see *ante*, at 12–13, ultimately meets with this Court's approval, then the Robinson-Patman Act will simply not apply in the special-order context. Any time a special-order dealer fails to complete a transaction because the high price drives away its ultimate customer, there will be no Robinson-Patman violation because the dealer will not meet the "purchaser" requirement, and any time the dealer completes the transaction but at a discriminatorily high price, there will be no violation because the dealer has no "competition" (as the majority sees it) for that specific transaction at the moment of purchase.

III

As the Court recognizes, the Robinson-Patman Act was primarily intended to protect small retailers from the vigorous competition afforded by chainstores and other large volume purchasers. Whether that statutory mission represented sound economic policy is not merely the subject of serious debate, but may well merit Judge Bork's characterization as "wholly mistaken economic theory."[5] I do not suggest that disagreement with the policy of the Act has played a conscious role in my colleagues' unprecedented decision today. I cannot avoid, however, identifying the irony in a decision refusing to adhere to the text of the Act in a case in which the jury credited evidence that discriminatory prices were employed as means of escaping contractual commitments and eliminating specifically targeted firms from a competitive market. The exceptional quality of this case provides strong reason to enforce the Act's prohibition against discrimination even if Judge Bork's evaluation (with which I happen to agree) is completely accurate.

Accordingly, I respectfully dissent.

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[5] R. Bork, The Antitrust Paradox 382 (1978).